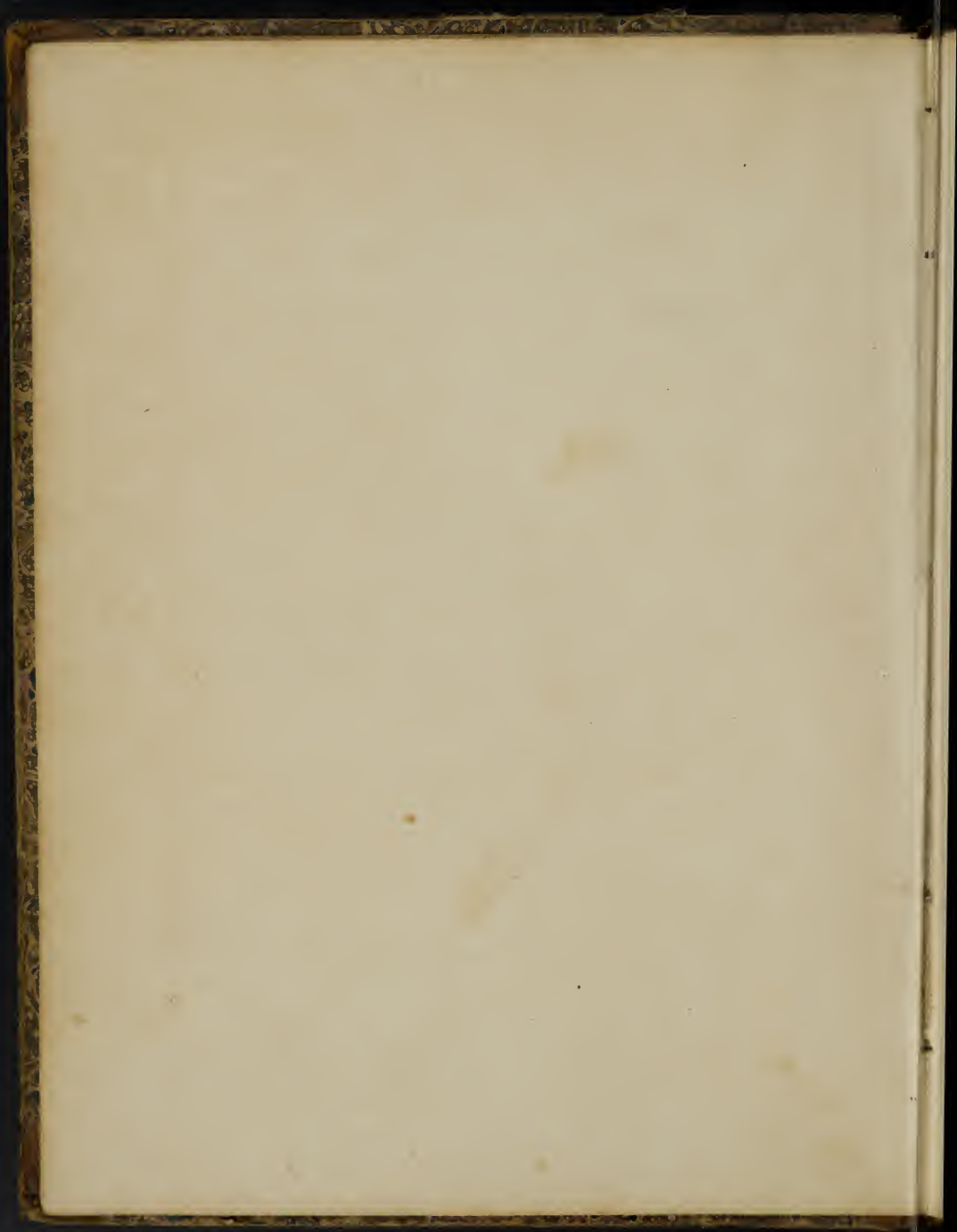
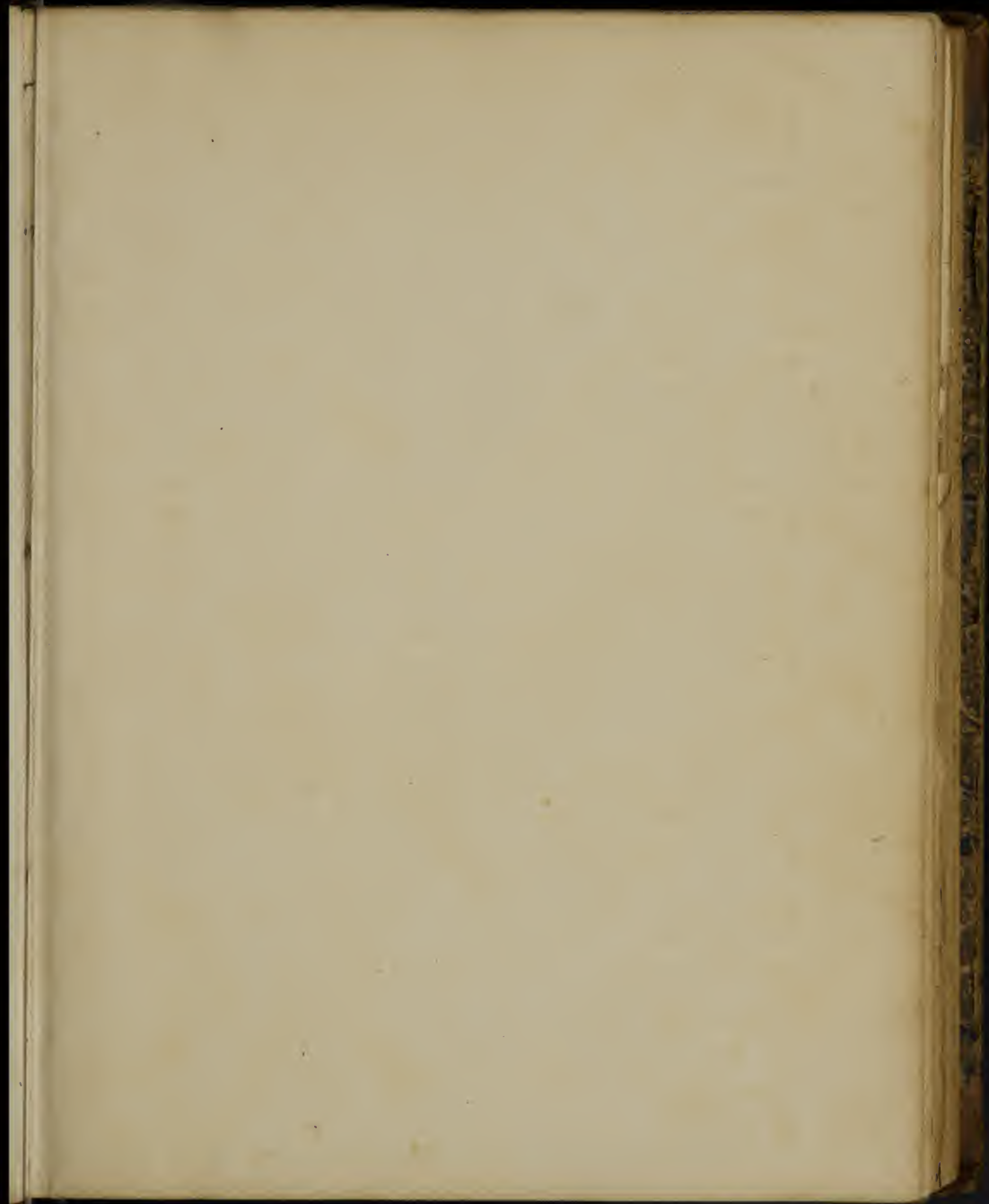




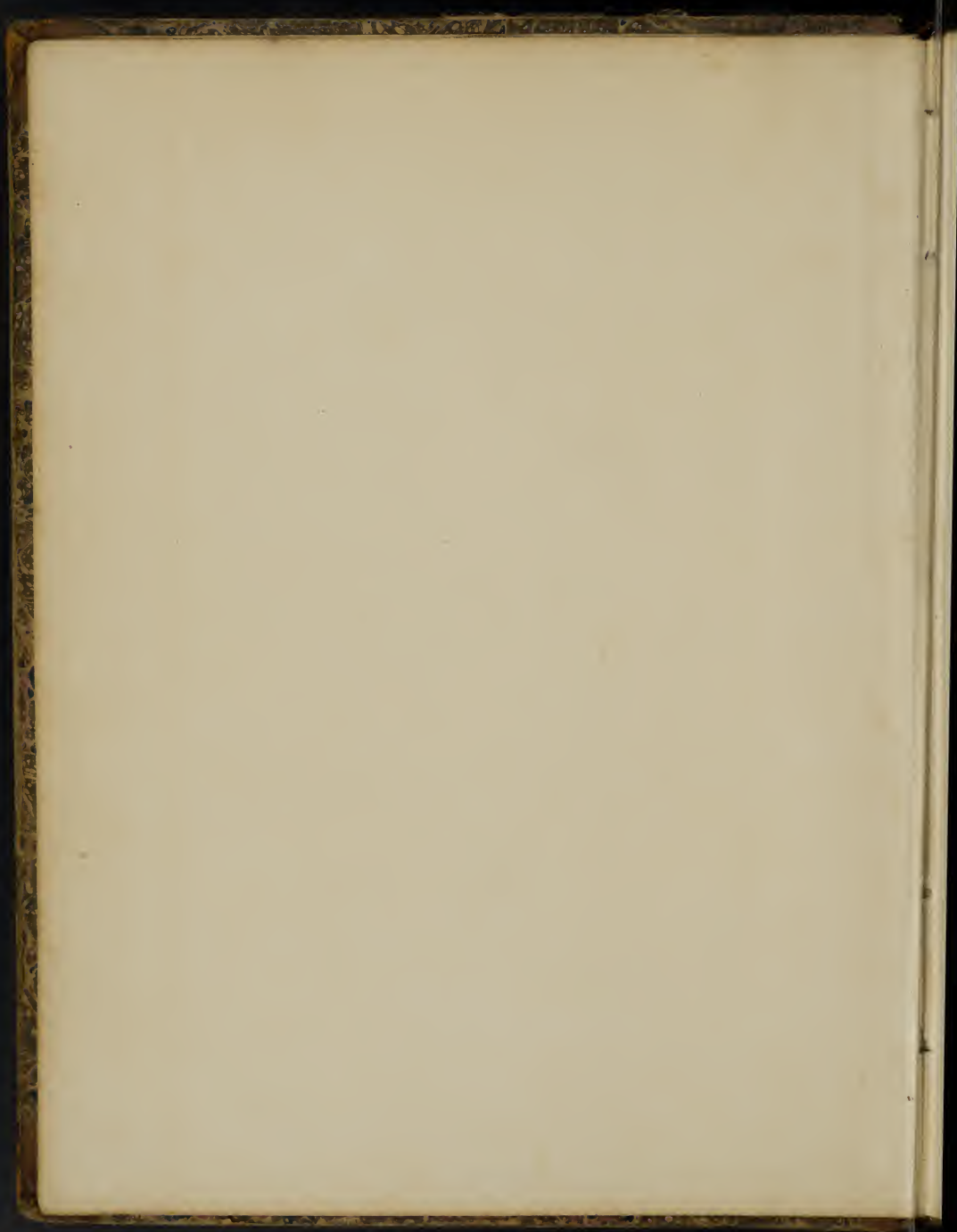
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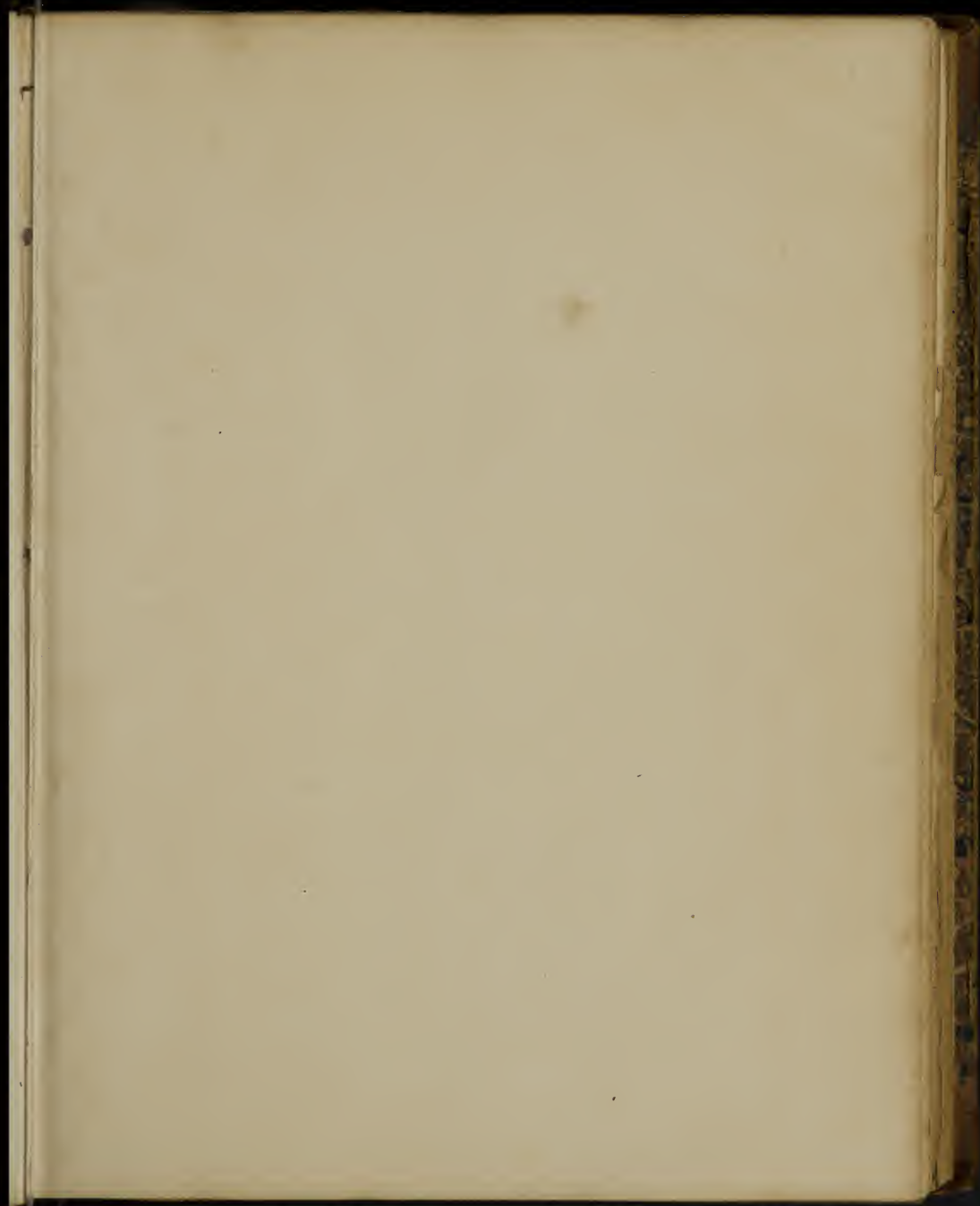
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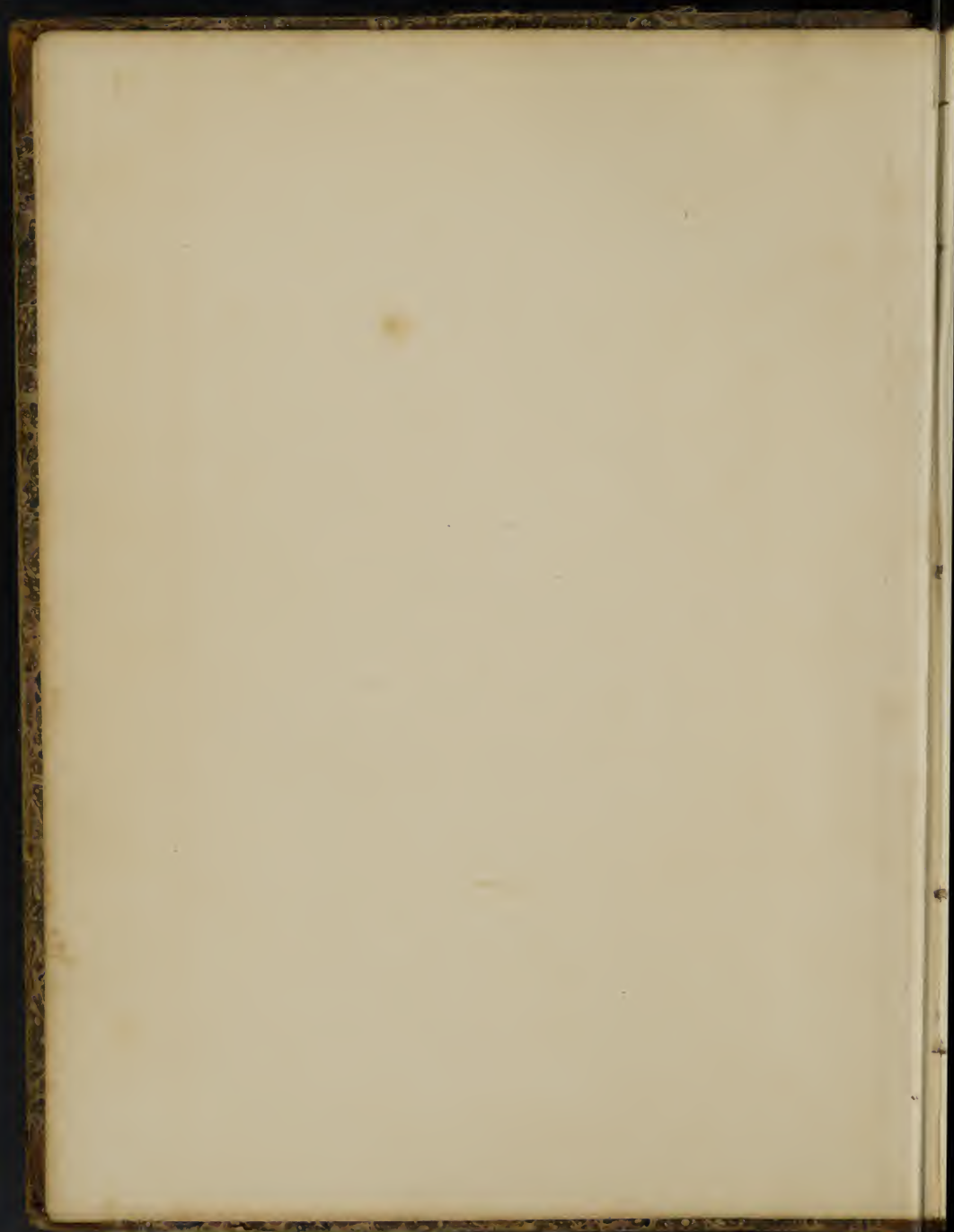




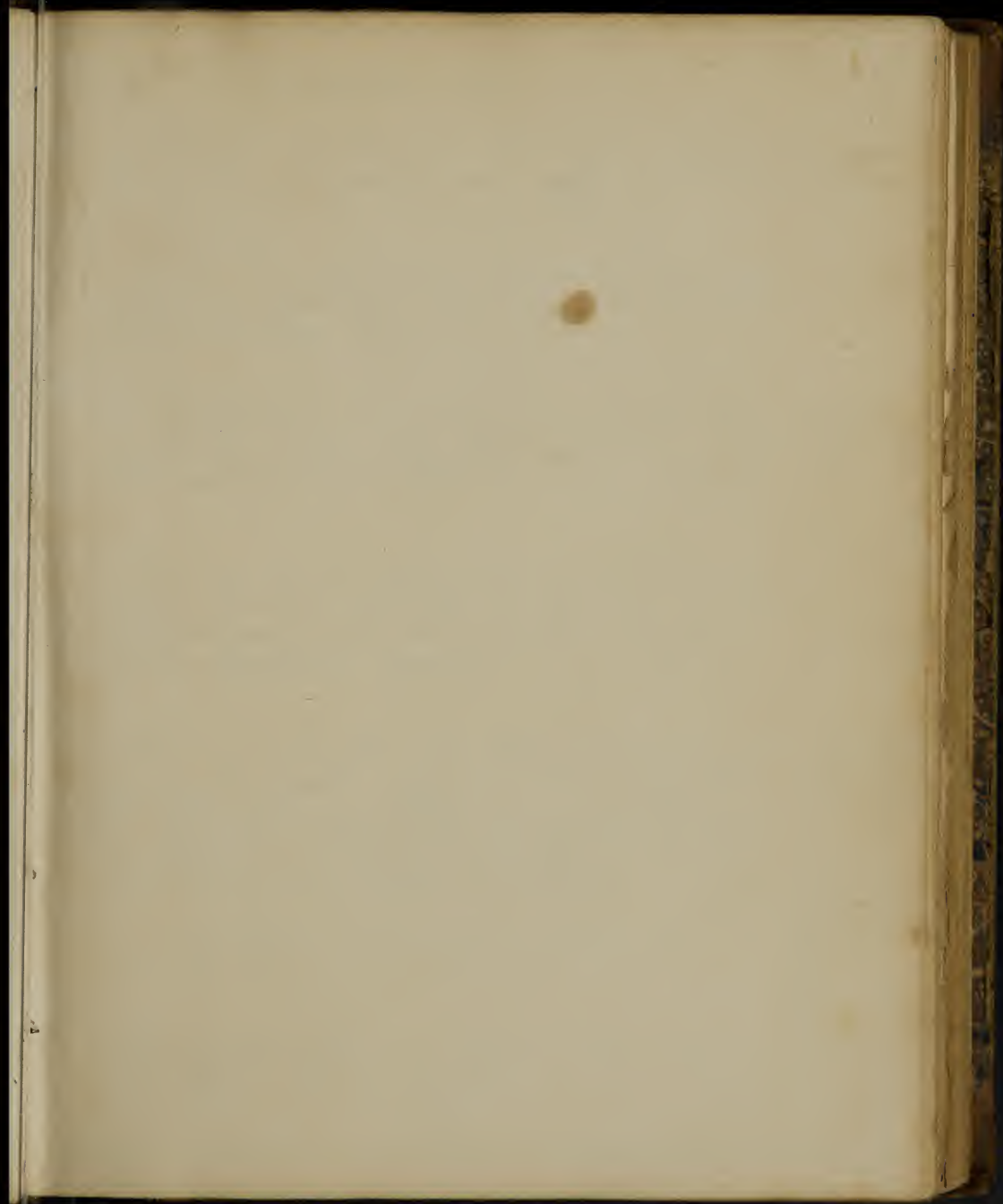


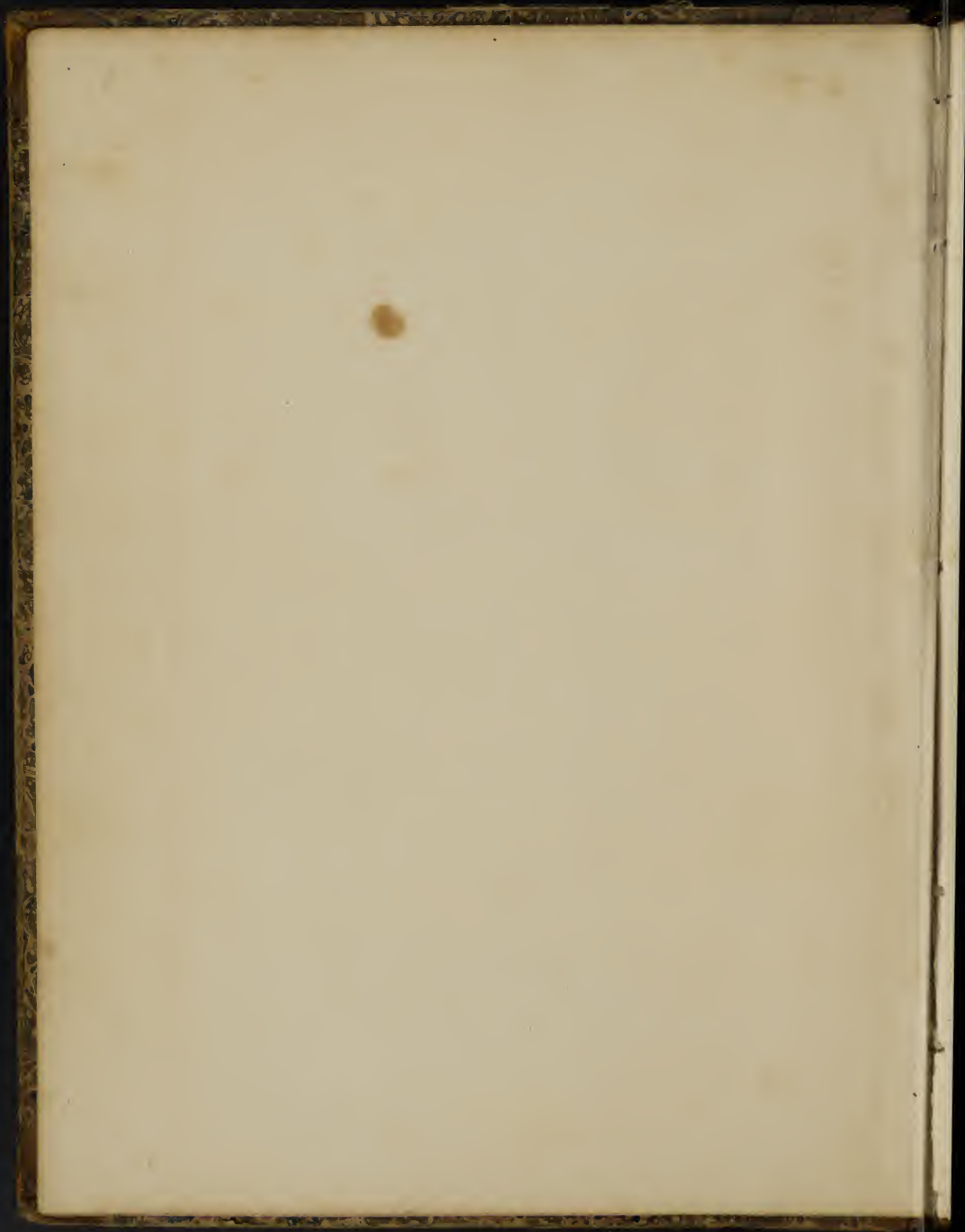












## Contracts (181).

A contract is defined by the Ed to be an agreement between two or more parties upon sufft consideration 2 BL 442 to do or not to do a particular thing.

But the term contract includes as well agreements executed as agreements executory. Ex: it includes feoffments deeds leases

+  
"It A contract is some kind of agreement. this 1 Pol 9 necessarily implies the assent of parties. with 2 BL 442 this mutual assent there can be no contract.

There are various classes of persons who do not possess the legal capacity of assenting and such of course can make no contract. Ex gr. idiots. lunatics maniacs.

With regard to this class their contracts not of 4 Co 123:6 record are quilly void and all Pol says that 1 Pol 11:12 the better opinion is that non est factum may 2 Roll 728 be pleaded to them. But Pol thinks that the disability must be specially pleaded.

4 Co 123  
Salk 675.  
Esp' Dig 223  
Stra 1104  
Ballen NP 172  
H Rec 87

Their contracts however appear to be in genl void only as to some purposes. —



3d Ed 196.

301.

Salk 576.

1 Pont 12.

Garth 211. 250

435.

If non compos is particular test and a contingent remainder depends upon it if he surrenders his part: estate the contingent remainder is not destroyed.

Coslett 464

2 Ven 263.

1 Pont 12: 13.

But a person non compos is competent to receive property by devise. by bequest. by gift &c. but how can he acquire property by contract when he cannot assent - 3d Pont says. that the law presumes an assent to what is beneficial to him.

But the law seems to dispense with assent for his benefit.

Coslett 464

2 Ven 203

1 Pont 13.

If an insane donee to recover his understanding and assents to the gift &c this assent binds him and his heirs. but if he dies without recovering his understanding or if having recovered he never affirms or disaffirms his contract his heirs may affirm &c

The purchases then of a non compos are not void but only voidable and indeed they are prima facie good.

Contracts by a non compos made to alien his property or to create any obligation upon himself are in genl merely void. for these in com: *1 R. 214* presumption are not beneficial.

But as to these classes of contracts, the rule of the c is that the non compos can not himself even in recovering his understanding take advantage *Bro E 398* of his disability according to the maxim 'no man 622 of full age may stultify himself.'

*4 Co 123.*

*Litt 5405.*

*1 Fonb 411.3.*

*1 R. 214. 26.*

contra however *Bullen N. P. 172. Stra 1104. 2 Vent 195. 2 Kent & C 1051. 5 Pick 431. 15 Johns R 503.*

There are diff<sup>t</sup> modes in w<sup>h</sup> advantage can be taken of the voidness of his contracts. thus his rep<sup>t</sup> *6 Co 124.5* representatives may set them aside.

*Bro E 398*

*Fitz 202*

*3 Bac 67*

Again after office founds the King may by rep<sup>t</sup> avoid all contracts made by *idea 9* to that of record *4 Co 126 (1)* during the life of the non compos. - By office *4 Co 170* found as ignorant an inquest of 12 men. and *R. 214.7* this office found has relation to the commencement of the disability

he count a man is at liberty to stultify himself

2 Vern 414.

3 Cch 170.

21 Mch 105.

III.

1 Eq. ca: 279.

Again a suit in chancery may be brought by the party or by the committee of the non compos during the life of the non compos for the purpose of avoiding such contracts.

1 Ch. ca 153

1 Pa. 28:9

If a person while sane makes a contract and afterwards becomes non compos: a suit may be brought in his behalf & in his name to compel performance. in this case he indeed appears by his committee &c.

4 Co 125a

2 Vern 412

214

1 Pa. 28:9

And both lunatics and idiots are bound by consequences of record. The rule is founded on the doctrine of estoppel.

10 Co 412

2 Co 21:2.

11 Co 303:4

3 Co 74.

21 Co 133

6 Co 114

11 Co 304

4 Co 125.

An idiot is a person who has no understanding from his nativity: a person who has no glimmering of understanding is not an idiot. any one who can tell his own name, or the name of his parent count the days of the week or count twenty is not an idiot tho' his contracts may still be void as being non compos. A lunatic is one who has had understanding but who has lost it by some super-ventant cause, and all non sane persons are either lunatics or idiots.



Intoxication is not per se a ground either in law or in equity for setting aside a contract. the rule supposes that the intoxication is voluntary

2 P.M. 131.

1 Ves. 19.

2 Lev. 462

1 Ton. 662

1 Port. 29. 30

But if one party draws another into a state of intoxication and then takes advantage of this state to procure a contract such contract will be set aside in equity.

3 P.M. 131

1 Port. 30

The fact that one party is of a weak understanding is per se no objection to a contract unless the weakness amounts to idiosyncrasy or lunacy &c. &c.

3 P.M. 129

1 Port. 650.

But if any fraud or unfair practice is used on a person of weak understanding Equity will set aside the contract. and if in such case there are any circumstances warranting a suspicion of fraud a Co. of Equity will set aside the contract.

3 P.M. 129

1 Port. 131.

On the ground of want of capacity infants can legally make no valid contracts. & the civil law full age was 25. vide Parent & Child

Port 32-57

The contracts of feme covert are in quid  
void because she is supposed to act at his  
coercion. her contracts in quid bind neither  
him nor her. vide Hus. and wife 5

1104. 111. 3. There are cases in which one person may bind  
1105. 173. property in the hands of another as well as  
200. bind himself. Thus estoppel trust may by  
his sole contract bind the trustees. and the  
trustees will be bound in equity to perform  
the contract by executing the conveyance &c.

12R 113. 735 On the other hand the trustee may sometimes  
72R 3. 47 bind the estoppel trust not on any principle  
663. of right but to prevent fraud on third  
85R 576. person. Ex. gra: A is trustee to B but the  
111R 334. trust does not appear on the deed to A &  
447. I & ignorant of B's right makes a bona  
Pou-Mont fide purchase of the estate for value & p.  
295. will hold ag<sup>t</sup> B. The purchaser here  
is in Id the purchaser

2 Vern 213. Again an ancestor seized in fee simple may  
1104. 111. 3. by agreement to sell his estate may bind  
the inheritance in the hand of the heirs  
and the heirs will be compelled in Equity  
to convey if the ancestor dies before conveyance  
or other examples vide  
4 Br 2. 435. 1 Vern 210. 1104. 111. 3. 116. 123.

The contract of a feme sole will in general bind  
the hus? whom she afterwards marries. for the  
hus? takes her property or the controul and use  
of it. and the marriage sustains her sole  
liability.

2 Vern 448

10 Mod 160.

243.

1 Par. 123.

1 Mod 211

If tenant in tail agrees to convey the inheritance  
the issue in tail are not bound to convey  
for the issue claim per formam Doni.

1 Lev 238. q.

2 Vent 350.

406 203.

2 Ves 634.

See in ch 48.

1 Par. 126.

11 Mod 171

But if on such an agreement the issue in tail  
receives the purchase money the issue will be  
compelled in equity to convey for the issue they  
tacitly confirm the agreement made by his ancestor.

And an agreement by tenant in tail to dispose  
of the permanent profits and improvements  
will not bind the issue in tail.

11 Co 50

Poph 194.

1 Par. 127.

The exec and adm<sup>r</sup> of every person are in general  
bound by his contracts tho' not named - This  
of course supposes that they have assents.

2 D. M. 197

1 Par. 128



As to power of the agent or atty to bind his  
principal vide master and servant. In genl  
any agent or atty may bind his principal as to the  
extent of the authority given to the agent or  
attorney.

2 Vern 450 If a tenant agrees to alien his part of the estate  
and dies before that agreement is carried into ex-  
ecution the surviving joint tenant is not bound by the agreement.  
This rule is greatly qualified in equity for if  
the agreement arises in equity to a severance of the  
estate the agreement will be enforced against the  
survivor — but such an agreement will generally  
amount to a severance and indeed always if the  
agreement to sell was a valid contract. This rule  
originally meant that if the contracting tenant  
gave possession to the person with whom he contracted  
this would amount to a severance in equity —

The agent given to contracts may be express or  
implied. An express agent is one who is named in  
words or signs intended to signify the agent.

This express agent may be precedent, concomitant  
or subsequent to the principal act. Ex. of the  
first. A master sends a servant to purchase  
goods and tells him to take them up on his credit.  
Secondly a man receives goods and promises to  
pay. Thirdly a servant purchases goods on his  
master's credit with the previous authority and the  
master ratifies the contract.

A tacit agent is one not expressed by words  
or signs and it may arise in several ways  
agent may be implied from mere silence. Ex  
If prior mortgage is present while the mortgagor  
is contracting with 1st for a second mortgage 2 Vern 151  
and knowing what is going on says nothing of 1st Mort 343  
his mortgage he tacitly agents to the priority of 1st Mort 370  
the second mortgage. See how 2d Mort 115  
Nes 6.  
Rt 66357

Like analogous cases 1 Eq. ca 355. 2 Vern 239. 1 Port 152  
2d Mort 105.

One court will in certain circumstances, infer  
such an implied agent wgt an infant for the  
purpose of preventing fraud — Examp. mortgage Barnes 1023.  
in the last case. 1 Port 124.

But to raise an implied agent "from mere silence" 1 Port 134:5.  
he must know that his claim interferes with the  
second contract and his silence must be voluntary.

And in genl the law will raise an implied 2d Mort 355  
agreement when that is necessary for giving effect to a principal express contract. ex gra a man 1 Port 138  
sells trees growing on his land — a man rents  
a chamber.



2nd 137  
2nd 138  
2nd 139

And according to Mr. Poir. it is implied in all contracts that if either party fails to perform his part that he will pay all damages. This appears to me to be refining overmuch the law implies defaulting party shall pay the damage

1st 139

What circumstances invalidate a part. sometimes ignorance a mistake in point of fact will invalidate a part. ignorance of law as a general rule will never

1st 139  
1st 140  
1st 141

If a mistake concerning one's rights is occasioned by the fraud of the other in equity such mistake will destroy the contract or when an heir was induced to think that his ancestor's will was duly executed and to release for a small consideration and in this case where the mistake is occasioned by the fraud of the other it is not material whether the mistake is of a question of law or of fact

1st 142  
2nd 143

If on a doubtful right a compromise is made this contract is valid in law and in Equity for this is a voluntary bargain of hazard.

But where the party really entitled is ignorant  
of the extent of his rights and of the means of  
ascertaining the extent. a Co of Equity will under  
certain circumstances relieve the party against an  
agreement concerning this right. Ex gra the case of 30 M. 316  
the orphan in London. I think that this 120 200  
case turned upon the fraudulent concealment. 120 144.5

One case whl cannot well be reconciled to any  
of these principles or any well known principle. 2 P. 196.  
whl is the case of the case of the schoolmaster Masley 364.  
here the mistake was in point of law. and no  
fraud. But I think that the only way in  
whl it can be reconciled with principle is that  
the effect of the teachers advice was the same as  
fraud.

Wagering contracts are in genl at C. binding upon both  
the parties. and it is not essential to the validity  
of such a contract that the event concerning  
whl the wager is laid should be itself contingent.  
of both are equally ignorant of that event. 5 Burr 2102  
But if one party knows the event his concealment  
of that event will be a fraud 148

There are cases also in which the apert of a ~~contract~~  
purchaser of an estate may be invalidated by  
misrepresentation or mistake concerning  
the estate - even where there was no fraud

1 Ves 400 The rule of discrimination is this -  
1 Vern 321 If the mistake is concerning that which appears  
2 Vern 185 to have been a sine qua non of the contract  
1 Pom 147-9 the purchaser is not bound. but if the  
2 De 196, 201 mistake relates to that which does not appear  
to have been the moving cause of the apert of  
the purchaser then if there is no fraud the contract  
will bind the purchaser. 10 Ves 141

Yet in this case it is said that the purchaser  
may be entitled to compensation for this  
defference. but I do question this rule for here  
is neither contract nor tort on which to found the  
claim of compensation -

But still Equity may order the payr  
only of so much money as the

Mont 150 If however on an agreement for a purchase the  
purchaser makes it an expres condition that  
the estate shall possess certain qualities, here the  
absence of these qualities discharges him for  
in such cases the contract by its terms does not  
bind the purchaser.



And it said that in some cases the intention of the parties as to their agent may be inferred from circumstances. i.e. a man purchases a female slave in the shop of a male. (H)

But says that if a man pays a sound price for an unsound horse the contract is void because want of agent on the part of the vendor can be inferred from the circumstances. — But this rule is entirely agt authority 35 R 157 Pak R 115. 113. 2 East 314. 322. Comp 88. Long 23. 17 R 133 1 Selw NP 687. 10th 113

It however in this case the vendor has known of the unsoundness and concealed it. the vendor might have recovered damages for the fraud. but the contract is still good.

### • Subjects of Contracts.

A distinction is to be taken between contracts executed and executory a contract is said to be executed when the parties transfer property to each other either with present possession or with an indefeasible right of future possession. The converse of this is an executory contract.

By a contract executed no man can convey a thing in which he has not an actual or potential interest at the time of the contract.

Hence a grant of all the land &c wh<sup>ch</sup>  
Hob 132 he shall have a year hence is void. ~~as a grant~~  
Co Litt 304b  
Plowd 432  
1 Pont 152 — 3 Lev 146. Esp's Dig 233. 306.

If A sells to a chattel on condition that  
the purchase money shall be paid six mos.  
hence and if the money is not then paid the  
sale shall be void. Now if A sells the chattel  
Plowd 432 before the expiration of the time and B finds  
1 Pont 154:5. to pay so that the horse becomes B's. Still  
the second sale is void. for the second sale  
is ab initio void.

47 R 248 No man can grant, or in any way transfer  
1 Pont 135. that in wh<sup>ch</sup> he has only an inchoate right  
Dyer 221. therefore a contingent remainder cannot be  
transferred by grant &c in present. And  
any such grant is void.

Fearn 441. Such a contingent interest is however descendible,  
445. devisable and by an ex'ary contract assignable.  
1 Foul 2023  
209. 37 R 58. 1 H Bl 30.

But a thing of wh<sup>ch</sup> one is potentially the owner  
may be transferred by grant in present — it  
is a thing merely accessory to a thing actually  
vested in the vendor at the time of sale may  
be transferred by contract executed.



Ex grā. A man may grant the profits of his land for three years &c. and indeed he may grant the future profits of any thing in his possession at the time of the contract.

But rights not vested either actually or potentially may be the subjects of contract  
ex'gr

Where no future act is to be done to give effect to a contract that contract must be wholly executed contract and hence if a covenant to stand seized to the use of B of lands which he shall hereafter purchase the covenant is void. for a covenant to stand seized in legal effect a grant executed. and here no future act is to be done to give effect to the covenant.

12 Co 157-60.  
2 RL 443.

But a contract executed may bind a future interest by way of estoppel. ex. A makes a conveyance of land of which he has no title at the time with covenant of seizure & he afterwards purchases the land. the grantee will hold for the grantor is estopped by his covenant of seizure from denying that he had a title at the time.

2 Lk 276  
2 RL 247.  
Mellish 495 B  
3 RL 370-1  
Exp D 333.306  
1 TR 760  
Co Litt 265.

Rule the same where a fine is suffered of a contingent interest. and the contingent interest afterwards falls to the grantor.

Root 122.

Requisites of contracts. they must be possible  
of performance. lawful in its nature. and certain

1 Br 416. 78 II Possible of performance. See non cogit ad  
v. and aut impossibilia.

1 Rep 426 Where thing stipulated is physically impossible  
Ex Litt 206. there can certainly be <sup>no intention</sup> intended by the parties that  
Park 5745 the contract should be performed. Thus if  
Ex Litt one sh<sup>d</sup> covenant to suffer a non suit in an  
1 Br 174 action whh is not pending.

But the law distinguishes between thing actually  
impossible and thing whh is impossible to the  
party contracting the not, in the nature of  
2d Ray 1168 things impossible. Thus if a contract to  
1 Br 416. 2 sell an estate whh belongs to B. the contract  
binds A & he is liable in damages for non  
performance— in this case Equity will not  
decree a specific performance but will leave  
the covenantor to his remedy at law.

There have been several contracts whh have been  
2d Ray 1164 brot before the court at West-hall concerning  
bills 305 whh the C have been at a great loss. —  
1 Vent 169. In the cases of geometrical progression. — The  
1 Lev 111. C. in these cases took a middle course. but 2d  
Kel thinks that the contract ought to be considered as  
1 Mil 295 void on the score of fraud. for it is evident that  
1 Br 416. the person contracting was deceived.  
Tha 406. When the thing stipulated to be d<sup>d</sup> is not delivered  
2 East 211. the rule of damages is in genl the value of the thing.  
1 Forb 424 1 Br 4108. 1 Vern 217

## Contracts. (122)

On the ground of impossibility of performance no contract is void unless the contract is altogether impossible. Hence, if a covenant that if he dies with issue his lands shall be settled on B. the contract will be good & may be specifically enforced in Chancery. - i.e. the C will compel him to make a limitation according to the covenant. 1 Poul 163. H.

And if one covenants to do a thing not in itself impossible his being prevented from performance by the act of God will not discharge him. for where he covenants expressly and unconditionally he assumes the risk. 3 Barn 1639. 1 Foul 366.

III The thing stipulated to be done must be lawful. ~~scilicet~~ the contract is void.

Now the contract is unlawful in which the agreement is to do something *malum in se* or *malum prohibitum*. A bond therefore contract to commit murder theft a battery &c is entirely void. 1 Poul 165. 1 Hawk P 6103. 1 Foul 213. Comp 3.9.

Any contract is unlawful which



A contract is supposed to be ag<sup>t</sup> the law of  
the land wh<sup>t</sup> is opposed to the public welfare  
or wh<sup>t</sup> is opposed to some principle of the  
law with regard to policy. or wh<sup>t</sup> is opposed  
to some express stat.  
2 M & 341  
37 R 17.22  
7 R 573.  
8 R 59.

Hence a contract the object of wh<sup>t</sup> is to restrain  
one from trading in a particular way is void  
as being opposed to the public welfare. Hence  
if one covenants not to follow the trade of  
a black smith the covenant is void.  
H 6211.  
Ray 292.  
10 R 166:7  
Bro E 872  
H R 322:7  
Comp 39.  
7 R 543.  
8 R 59.

Hence a contract by an individual that he will  
never marry is void—

11 Co 53 (4) And a contract the object of wh<sup>t</sup> is a gen<sup>l</sup>  
restriction of trade even for a limited period is  
void. A man therefore can not bind himself  
not to exercise a particular trade for a week.  
7 R 573.  
Co Litt 106.  
1 P M 181.

But an agreement not to exercise a particular  
trade in a particular place may be binding.  
10 R 151.  
192.  
10 M 27.55.  
130.  
But a contract of this kind will not be binding  
unless founded on what the Ct. shall deem a  
suff<sup>t</sup> consideration. and the onus probandi is on  
the side of him who claims under the contract.  
and the presumption of law is ag<sup>t</sup> the existence  
of a suff<sup>t</sup> consideration—

But according to the law if a legal consideration is shown the presumption is in favor of irrebuttable that the consideration is sufficient the preceding case is therefore an exception to the general rule.

It is immaterial whether the trade which one covenants not to pursue is his own trade or not. 10 B Mon 169. 192. 1 Port 169.

On the same principle an agreement for unlawful maintenance is illegal & void. whether the agreement is in the form of a bond a contract or in any form. 4 B Mon 135. 2 B Mon 212. 1 Port 172.

And in general any contract with an alien enemy is void. because intercourse with an alien enemy is dangerous. 1 B Mon 55. 5 B Mon 648. 1 Port 173.

And an insurance on the property of an alien enemy is void. for this insurance promotes the commerce of the enemy and gives our citizens an interest in the welfare of the enemy's vessels. 8 B Mon 548. 6 B Mon 35. 1 East 96. 475. Bory 238. 1 B Mon 345.

But a contract of ransom with an alien enemy is obligatory. by a ransom contract is meant one by which a captured party on the sea in consideration of being discharged with his vessel agrees to pay a certain ransom. the captain captured has a right to make such a contract and it binds the owners as well as the captain 3 B Mon 1754. 1 B Mon 563. Bory 619.



1823  
March 23  
37.

The the contract is valid still no remedy  
can be obtained upon it in the country of  
the captured until the time of peace.

March 23  
1823.

And such contract can be enforced only in  
a C<sup>t</sup> of Admiralty.

1865  
3 June 1734  
July 619

It is usual in case of a ransom contract for the  
captured party to deliver to the captor a hostage  
as a pledge but this hostage is not essential to  
the validity of the contract.

And the contract continues in force tho the  
captor is afterwards captured either with or without  
the hostage.

And the capture of the hostage or the death  
of the hostage does not affect the contract.

July 25. 6.

And any contract with an alien enemy which  
arises out of a state of war and wh<sup>ch</sup> tends  
to mitigate the evils of war are binding.

March 23  
1823.

By St. 12 Geo. 3. Ransom contracts are declared  
void.

Marriage briage bonds contracts &c are void by  
then are meant bonds &c given to procure apostat  
in marriage but the form of the contract is  
immaterial - Regt 474. 5.  
3 Nov 411. 1 Pm 174-190. E. 175. 114. 2676.  
245.

Alia contracts may be void as being opposed  
to some maxim or principle of law. hence 3 Salk 97.  
if the consideration of the promise or the 1 Bult 38.  
promise itself a thing stipulated to be 1 Pm 176  
performed is agt any principle of law the  
contract is void.

Hence a <sup>in consideration</sup> promise that I shall fraudulently discharge  
a debt due to his master is void. here the cons 3 Salk 97.  
is opposed to a principle of law. 1 Pm 176.

If a Sheriff promises for valuable consider to permit an  
escape the entire contract is void. here the promise Bro E 199  
itself is opposed to law. And on the same 10 Co 76.  
principle a bond &c to indemnify the Sheriff 102.  
agt the consequences of a voluntary escape is void. 1 Pm 170.

A Promise by a minister of justice to do a thing Bro E 230  
contrary to his duty is void. and a bond of  
indemnity to such minister.

But where the fact whh makes the consideration unlawful is unknown to the promisee a contract of indemnity founded upon it may be binding. Thus if  
Hut 53. Plf in fi fa: directs the shff to take goods as  
1 Bos. 177.8. the goods of the deft. and promises to indemnify the  
Croft 752. shff if they do not belong to the deft. this promise is binding and if the shff is subjected he may recover agt the Plf.

All contracts opposed to the laws of morality and decency are void. Hence where a wager was made as to the sex of Chas: ——— and an action was brot upon it but the wager was held to be void  
Comp 39  
729. 735.  
27 R 610.  
37 R 693.  
1 Bos. 185.  
233.

And any contract made for any corrupt purpose is void as being illegal. Ex. I make a wager with a judge that he will not decide my case in my favour.  
Mansf. 296.  
Comp 39.  
27 R 610.  
1 Bos. 182.

Again a wager whh is but a disguise for a wager is illegal and void.

Again a wager as to the correct mode of playing any unlawful game is void as promoting a knowledge of the game.  
34 R 413.  
1 Bos. 184.

But a wager between the Plf and Deft in a suit in regard to the ultimate decision of it, is good for the wager does not tend to influence the decision.  
Comp 37.  
1 Bos. 184.



Wagers are in gent by 62 valid but the  
modern judges have strongly inclined to consider 27L 610.  
all wagers as invalid. Justice Buller contended 30R 693.  
ag<sup>t</sup> them strongly. Marsh 276.

In Count by it all wagers are made illegal &  
all loans of money made at the time and place  
of gaming to be party gaming can never be  
recovered.

Contracts made in fraud of third persons are  
illegal and void. Ex. an agreement made  
between the sutler of the Army and one who  
provided supplies that an excise price should  
be given for the purpose of dividing the excise

Dougl 433 n 450  
Esp 2 Dig 104  
Hall 156  
47R 166.  
27R 763.  
14B 322.

Examples of this sort have frequently occurred  
in marriage settlement agreements but in these  
as in all other cases the fraudulent part of the  
transaction is void. Stra 440. Esp 2 Dig 104.

656.  
18B 1095.  
286.  
20B 9165. 176.  
18B 9155.

A promise to pay a puffer for attending an  
auction to enhance the price of goods is void.  
10B 186.

Again contracts are void when their object is to  
the omission of some legal duty. Ex the covenant done 88L.  
of an under sheriff not to execute process on a  
certain suit. &c. 10B 195. 6

Again a contract wh<sup>ch</sup> tends to encourage  
an unlawful act or a unlawful omission is  
2 Es 12643 illegal and void — Ex: an obligation given  
10 Co 100/4 for compounding a felony.  
1 Ser 109. Bro 6147.

But it is said that an obligation given  
for compounding a mere misdemeanour is  
7 Ab 475 a. may be good. I doubt this distinction  
com: Pleas in Court decided such oblig<sup>ts</sup> to  
be void. — The case in 2 Wils 341 is directly  
2 Wils 341. opposed to this rule.

1 Don 146. A bond given to indemnify a printer ag<sup>t</sup>  
any indictment he for printing a libel is  
void.

A contract to indemnify a thief for embezzling  
a writ is illegal and void —

1 Don 191-9. A wager between two that one of them or even  
a third person shall commit a criminal  
act is void.

6 Cr 479 Contracts forbidden by st law are of course void hence  
13 R 786 contracts in wh<sup>ch</sup> more than lawful int<sup>er</sup> is reserved  
1 Pat 136 are void.

(Long 646. Also by the bankrupt law any contract or secret  
6 Cr 670 (n) agreement by a bankrupt or by his friend to pay other  
1 Don 159 money to a creditor for payment of signing the act  
of bankruptcy — so indeed such an agreement is void  
by st law as a fraud on third persons. Sup<sup>r</sup> Ct Conn —



Where certain stipulations in a deed are valid and some made void by stat law the whole instrument is void.

Wils 351.

1 Wils 237

But where some stipulations in a deed &c are good and some made void by C.L. the former stipulations are good and the latter are bad.

This distinction does not arise from any principle which makes a difference in effect between a partial illegality created by C.L. & by stat law. but it arises entirely from the diff<sup>t</sup> manner of winding the stat and the manner of winding the rule of the C.L.

But tho' an illegal contract creates no right it can be enforced yet when such a contract has been executed in some cases the law suffers it remain executed & will not assist the parties to rescind it and in others the contract even after execution may be rescinded.

Where the contract is such that both parties are deemed criminal if the contract is executed Long 451 he who has paid the consideration of the illegal act cannot recover it back for he is in pari delicto and the maxim, *applies potius est conditio defendentis*, but while the contract remains executory the party who has advanced the money may recover back the money - Ex 102. 206. 7  
if he has paid, \$100 for committing a battery now 2 Bui 102 before the battery is committed he may recover the money. 10731  
It is too late to question this rule but it certainly is not a politic rule. - 342 298  
772

Since money deposited in an illegal wager & p<sup>d</sup>  
over with the loser's consent after the issue cannot  
1875 be recovered back by the loser but before the  
1878 issue either can recover the money from the  
1879 depository.  
1880

But if the money is not paid over or is p<sup>d</sup> over  
without the loser's consent

For When money is advanced to procure an office it  
can be recovered back before the office is obtained  
but not afterwards.

So premium p<sup>d</sup> on an illegal insurance may  
1871 be recovered before the risk is run  
1872  
1873

When the party who has p<sup>d</sup> money on an illegal  
1874 contract is not himself particip<sup>r</sup> crim<sup>i</sup>n<sup>i</sup>s there,  
1875 he may recover back the money even after the  
1876 contract is executed on the other side. - Ex gra  
1877  
1878 One pays illegal interest  
1879  
1880  
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1900

(Contra Saik 22.)  
If money has been p<sup>d</sup> by a bankrupt or his friends  
to a creditor for signing his certificate the  
bankrupt he may recover it back.

But a security given a contract made in consequence of a previous illegal act is not of course void

Han 2069  
42 R 415.

Ex gra. a lcp is sustained by, A & B in a smuggling voyage, A pays all the lcp & B promises to pay half the lcp, this promise is binding. —

405  
75 R 630

The contract here which is sued upon is not the illegal contract it is one step removed from it and the enforcement of this contract does not tend to illegality. the promise to pay is legal

24 R 379.  
22 R 372:3

It has again been held that if one of the partners paid shaft with the knowledge & consent of the other with any promise from the other that he w<sup>d</sup> pay that the party paying might have a promise ag<sup>t</sup> the other. But this rule is much shaken, & indeed overruled.

37 R 415.  
24 R 379  
67 R 61  
405

And it is clearly settled that if one partner pays the whole lcp with the consent of the other he cannot recover ag<sup>t</sup> the other

23 R 372:3  
75 R 630  
24 R 379  
Dart 28.  
Mark 412:14  
35 R 222

If a person makes a contract the making of which is itself unlawful, the contract may be enforced ag<sup>t</sup> the party making it, tho' he can claim nothing under it — Ex It is by it made unlawful for a clergyman to enter into trade & of course to draw a bill of exchange — yet he w<sup>d</sup> be bound by it.

1 R 166:9  
Ch Bly 19



1. 5th 1799 If one is concerned as a merchant in the  
smuggling trade and no other act he is considered  
as a smuggler for the purpose of subjecting him  
to the bankrupt law.

1. 2d 1362 An ill contract is void. Ex: a contract that  
a man will not smile in 14 hours. cas  
boni.

Comp 74 A contract which materially affects either the  
735. interest or the peace of his third person is  
37 R 644 illegal & void. Ex: as when a man is guilty  
1. 2d 1323

37 R 700. A wager which tends to the introduction of  
1. 2d 1323 indecent evidence is void.

Contracts must be certain in its terms.

1. 2d 1350 If the stipulations are left uncertain  
in any material respect the contract is void.  
1. 2d 1352 Ex: If I promise to have goods with B on condition  
47. that B shall pay in a short time.

7. R 124 But a promise to pay money at the appointing  
417 any time is good for the money is due immedi-  
ately.

1. 2d 1350 If however a person promises to a specific  
act & an act in specie & appoints no time for  
performance he has his whole life it is said  
for performance.



But what makes this difference. A promise to pay money creates a debt and a present debt is a present liability. but a promise to pay a specific thing creates no debt.

But I doubt whether the latter branch of the rule is now law. I think in such case the performance might be enforced in reasonable time.

It is a maxim *id certum est quod addi certum potest*. If then I promise to repay to J. whatever sums of money he shall pay for me during a certain period is good for J. can show the sum by averment.

Pepl. 144  
Co. 2194  
1 Keb 56.  
65  
1102. 180

So again if I promise to convey to J. all the land conveyed by a certain deed, this covenant is sufficient, certain for the deed referred to becomes part of my covenant.

## Nature & kind of Contracts.

Contracts are executed and ex gr.

2 SL 443

182m 234.

175. 158. 9.

A contract is executed when the parties transfer property to each other together with its immediate possession or with immediate right of future possession. A contract may however be executed on one part and ex gr on the other. Or where one performs immediately & the other is trusted.

175

Ex gr contracts are those which are introductory to an actual future transfer of property.

182m 237

182m 122

175 137

182m

182m 131.2

182m 247.

All contracts again are express or implied. But there has a third kind called constructive but this is an artificial division. Constructive contracts are such say all. Some are raised by construction out of express contracts but a contract raised by construction from the words of an express contract is an express contract. Ex gr. A man settles in a grant of the title of the grantor is a constructive covenant that he has such title - but this is still an express contract.

182m 252

182m 255

182m 257

182m 258

182m 259

182m 260

182m 261

Thus again a note in a marriage settlement upon this is whereas the gift is to pay to the wife \$1000 the marriage portion of the wife - This is consideration as a covenant to pay \$1000.

And a mere exception in a deed to may in some cases amount to a covenant. vide 'Cov broken' still this is an express covenant.

Salk 196. 11 Mod 170. -

Again a lease thus, 'I demise & yielding and  
leasing such a rent' is a covenant on the part of the lessee to pay such a rent.  
Poph 136:7 - Co fac 399 Wente 10. 112, 11571.

Implied contracts are those which are neither express  
in terms nor arise out of the construction of the  
words used but arise by operation of law out  
of the nature of the transaction. - Ex ra  
I request A to labour for me and he does the  
law implying that I promise to pay him for the  
labour.

If a ship loses money on an ice the law raises  
a promise that he will pay it to the O.

Other contracts are either absolute or conditional. 1 Rep 256:57  
The former are those by which one binds himself or  
his property absolutely & unconditionally. 60 Litt 201  
The latter is one in which the obligation depends  
altogether or in some respect on some event or  
the happening of which it is to be dissolved or  
to take effect or to be enlarged or abridged. 2 Bl 152:11. 120. 425:5.

If A sells a house to B on credit that in a certain  
event B shall pay \$10 in another event \$5. Here the  
contract is conditional upon the event.

If A agrees to pay B for land such an amt as  
C shall say it is worth here A's obligation is  
suspended until C names a sum. And if C does  
not name a sum A does not name it within  
the time appointed the obligation is annulled.  
when C does name a sum A's obligation becomes  
absolute. 1 Port 261  
Dyer 41:14



### Effect of unlawful conditions

60 Litt 206/4 If an unlawful condition is annexed to an  
Ex p<sup>r</sup> Dig 175. void contract not only the condition but the  
182. 185. whole ex<sup>r</sup> an contract is void — Ex. of is bound  
to B in an obligation conditioned to perform  
any unlawful act the whole obligation is  
void — performance of the contract can never  
be compelled for a right can never be acquired  
by committing an unlawful act.

2 Kent 109 And if the condition is for the performance of any  
3 Lev 411 unlawful, act or for the omission of any legal  
2 N. 344 duty the rule is the same.  
Ex p<sup>r</sup> Dig 175. 185.

17 M. 151. If the condition militates ag<sup>t</sup> public policy  
4 Barr 2225 the rule is the same  
Ex p<sup>r</sup> Dig 183. 5.

In these cases where the object is to induce the  
obligor to commit some crime the law discharges  
him from all liability, but he sh<sup>d</sup> be under a  
temptation to commit the crime to avoid the  
liability — & when the object of the contract  
is to induce the obligor to perform some unlawful  
~~contract~~ <sup>act</sup> the law obtains the same end by  
declaring the contract void for if he ~~does~~  
commit the crime he derives no benefit —



## Contracts (123)

2. If an ~~unlawful~~ <sup>subsequent</sup> condition is annexed to a contract <sup>for the purpose of securing the performance of an unlawful act</sup> executed, the condition only is void and the contract good. Ex: A makes a grant to B on condition that B shall do some unlawful act the estate is absolute in B and the condition only void. Here then B. can hold the estate whether he commits the act or not he therefore is under no temptation to commit the crime —

Rule still applies where the condition is precedent 2 Bl 157.

But this rule holds only when the parties are deemed to be criminal particeps. When the party making the grant is with an illegal condition is not in pari delicto the whole grant the whole contract is void. Hence if A gives a mortgage to B as security for the performance of an unlawful contract the mortgage is void.

3. So also a bond given as a reward for prostitution to induce a party to the crime is void but if given afterwards as a compensation it is good.

3 Burr 1565.

1 Bl 257.

20 Mm 432

3 M. & C. 339

5 p. 12

Bro 1570.  
2 Vern 233.

All conditions repugnant to the nature of the estate <sup>granted</sup> are void. To be granted in fee simple on condition that grantee shall never alien or shall not take the profits of the land the condition only is void and the grant absolute.

[27]

Still if a grantor makes a bond that he will not alien or will not take the profits he may be subject to an action for damages if he does alien or take the profits.

### Effect of impossible conditions.

An impossible condition may be one originally impossible or one which becomes impossible by some supervenient cause.

Co Litt 204  
1 Bou 264:5.  
444, 446.  
1 Co 98.  
Noy 35.  
10 Mod 268.

If a condition possible at the time of the contract but becoming impossible by the act of God or of the law the contract is not rendered void by this supervenient impossibility. This supposes an executed contract. To wit. the

(26)  
Bou.

Rule the same if a condition originally possible becomes impossible by the act of the party granting the estate.

Now the principle is that the estate being already executed it cannot be divested unless by some default of the grantee.

Co Litt 204  
1 Bou 220.

But if the impossibility of the performance of the condition arises from the fault of the grantee then clearly he loses his estate by non performance -

But the same, when the performance of the condition becomes impossible by the act of the law.

20 Mm 118.  
Salk 108.  
S. H. 251.  
1 P. 2446.

But if a condition originally possible but afterwards becomes impossible is annexed to an express contract it makes the contract & condition absolutely void. This supposes that the condition becomes impossible by the act of God, of the law, or of the person claiming under the contract.

Salk 170  
Fonb 269  
J. R. 354  
Long 659  
J. R. 638.  
2 H. Bl. 265.

Ex. Bond with cond<sup>n</sup> to export &c but such exportation is by law forbidden. - 20 Mm 90.

But if the obligor disables himself from performance - S. 621/2 the condition is of no effect & the bond is absolute. 1 Esp. 430 and the obligor incurs the penalty from the moment of disabling himself from performance - and so of the rule is in the case of covenants. Ex. I covenant to convey land to J. D. one year hence & I sell the land to R. R. tomorrow I am tomorrow liable on the covenant.

If a bail bond is given on condition that J. D. shall appear &c. if he fails before appearance day the bond is discharged. -

1 P. 265  
S. 6092  
S. H. 206/4  
Esp. 374  
2. 1 P. 224  
1 P. 417  
H. 20 -



It gives a bond conditioned to be void  
if it performs a voyage to France and the  
law declares such voyage illegal the oblig<sup>r</sup> is  
discharged

15R 638 Aug. whenever the obligee either prevents a  
discharge, with  
the 1136 discharge per the performance of the condition the  
obligor is discharged from all liability—  
659  
3JR 590 7JR 383 1 East 619. 18JR 53.

If by the terms of the contract the act  
of a stranger is made necessary as evidence  
of the performance of the condition, & the  
stranger arbitrarily refuses to furnish this  
evidence, the obligor is liable for non perform<sup>t</sup>  
even after he has performed—

It procured an insurance ag<sup>t</sup> fire on his  
house & the condition on the insurance was  
that the Parson of the village w<sup>d</sup> certify that  
there was no fraud. the Parson refused & the  
C<sup>t</sup> held that there could be no recovery.

1B4 P242 If a bond is conditioned for the performance of  
one of two things in the alternative and one  
of the two things becomes impossible the obligor  
is bound to perform the other unless the  
impossibility arises from the act of the obligee.

5622.

1B4 398

1B4 170

It appears to be the sound rule in such  
cases—



If a condition becomes partially impossible  
by the act of God or if the law the obligor must be set off  
still perform as near as may be. — ex parte.

352

2 BL 2731.

2 BL 254.

1706 209. 211. 2 Poul. 251. 1 Poul. 441-51. 2 BL 163. 581

Conditions originally impossible.

Such conditions operate according as they are  
subject <sup>to</sup> precedent.

Co Litt 100

A precedent condition is one w<sup>h</sup> must be  
performed before the right depending upon it can  
vest.

2 BL 156:7

A subseq<sup>t</sup> cond<sup>t</sup> is one by w<sup>h</sup> a right already  
vested may be defeated or restricted —

The condition on w<sup>h</sup> a contingent remainder depends  
is always precedent.

If a precedent condition is originally impossible Co Litt 105.  
the right w<sup>h</sup> is the subject of the contract can  
never vest.

2 BL 157.  
1 Poul. 206.

and tho' a precedent condition is possible at the  
time of making the contract but becomes impossible  
from any subseq<sup>t</sup> event yet the right can never  
vest

So if a precedent condition is unlawful the  
effect is the same. no right can ever vest.

2 BL 157

But if a subseq<sup>t</sup> condition is impossible at  
Coitt 106 the time of making the contract the contract  
2 Bl 156:7 is precisely as if there were no condition.  
1. P. 266.

1. Hall 172  
1. Par 267

2. If such a condition is incorporated in the body of the contract instead of being indorsed or underwritten the whole contract is void for in such a case the condition is necessarily precedent.

Statute of Frauds & perjuries. 29 Car 2<sup>d</sup>

At C & there is no kind of distinction between a contract merely parol and a contract merely written but not under seal -

Under this, it certainly contrasts, he will not support an action in & a Eg. unless the agreement or some mem: of it be in writing, signed by the party to be bound or by some agent duly authorized - This, it includes six clauses of agreement.

2 Dec 1879 1 If Any promise by an Ex<sup>r</sup> or Adm<sup>r</sup> to answer  
1 Dec 1879 out of his own estate any debt or duty of  
1 Dec 1879 his testator or intestate.

¶¶. Any promise by one person to answer for the debt default or miscarriage of another.

### Any promise in consid<sup>n</sup> of marriage.

IV They contract <sup>a sale of</sup> ~~conveying~~ lands tenements  
hereditaments or of any interest in a concerning  
the same.

V. contract not to be performed within  
one year from the time of making the contract

It being contract for the sale of goods was  
of the value of \$35. or 10s in England. This  
clause extends as well to <sup>75 R 24</sup> day contracts for  
the sale of goods hereafter as to contracts of 2 N B L 63  
sale to take effect immediately. Rob on 7111.

o There is one discrepancy between our St and the  
English St. In the English Stat under the 4th clause  
it is provided that all parol sales leases, &c of \$50 R 3.  
land except leases for three years &c shall 45 R 650.  
operate as a lease at will - but this estate 33 R 16  
at will is now an estate from year to year. 1 Bae 72 et  
"Agreement"

o In Count all parol leases for a time however  
that a however long are construed and are  
leases from year to year.

The object of this St is to prevent the proof  
of certain contracts by parol testimony. because  
it is supposed that there is in ~~these~~ particular  
temptation to perjury in permitting them to  
be proved by mere parol testimony.

It only promises by an exa to -

In the construction of this clause it has been held  
that if an exa is asked to answer the exa his <sup>Nez 1250</sup>  
parol promise may bind him - This is but a distinction 1 Rob on St 100  
and the rule appears clearly to be unreasonable. The 50 R 8  
reason is said to be that the possession of a party makes <sup>Stu 273</sup>  
the exa himself testator. but this is untrue - he cannot be sued as testator

Again a parole promise with appts. we have been  
told at C. L. if then a parole promise with appts  
is binding under the st. then the st. ~~provis~~ is a  
dead letter -

1. H. B. 622 But an acceptance of a bill of exchange by the  
3 M. B. 1 drawee ex a r. adu. is an admission of appts  
2. H. B. 125 and being in writing, binds the ex a r. adu. &  
2. B. B. 125.

1. L. 457  
Chitty, Ed. 123

112

3 M. B. 1 So also an endorsement of a bill, by the holder's  
2. H. B. 160 Ex a r. adu. binds the Ex a r. for the endorsement  
Ch. B. B. 111:12 is the drawing of a new bill

7. R. B. 350, 414 And, tho' the promise of an Ex a r. be in writing  
Feller, Ex 404 yet he is not bound by it unless some suff. consid.  
1. H. B. 125.6 is shown - appts. forbearance of a suit &c. are  
Comp. 273. good considerations. The mere fact that the  
Feb. 202 debt: is indebted is no suff. consideration even  
tho' the promise be in writing. For the object  
of the st. is not to make the Ex a r. liable in  
all cases where the promise is written - but to  
make him liable on his written promise only  
in those cases in which before the st. he would  
have been subjected on a parole promise



Again to make the Ex<sup>r</sup> <sup>personally</sup> liable on his promise  
the in writing there must have been an existing claim  
deft a claim binding upon him in his representative  
character

2 June 180  
Ex<sup>r</sup> 47

Where an Ex<sup>r</sup> makes a promise in writing it  
will not bind unless the consideration appears 5 East 10  
in the writing - under the stat<sup>t</sup> the consideration 6 East 507  
can no more be proved by parol than the promise Rob 116, 270  
itself. (contra 6 Conn<sup>t</sup> Sayer Wilson) 107.

And this rule concerning consideration holds in all  
cases except the 6th class of cases under the statute

To bring a case within this stat<sup>t</sup> the Ex<sup>r</sup> or  
Admin<sup>r</sup> must have been such at the time of  
making the promise - for if made by parol Amb 330  
before becoming Ex<sup>r</sup> it stands precisely as at Rob 201  
C. D. -

Ex<sup>r</sup> gra If a person not having as good a  
claim to administration as another promises the  
latter to pay to him a debt due from the testate  
if he will give up his claim this promise tho' by parol  
may be binding.

On a promise made by such rep<sup>t</sup> in an action  
as Ex<sup>r</sup> it is not necessary to aver that the Rob 205, 6  
deft has assets for if liable at all he is liable  
out of his own estate.

III. A promise made by one person to answer the debt duty a miscarriage of another.

Comp 127  
1781 306 In the construction of this it is held,  
Lo Ray 1017 that if a promise made by one person for another's  
3 Buss 1188 benefit is original the promise tho' by parol  
Exp Dy 1012 is still binding. scias if collateral —

When the promise is collateral within this distinction it will be found to be a promise to answer to for the debt duty &c of another — scias quoad original

By an original promise is meant not a promise to pay another's debt but one's own.

A promise is original in these cases.

Prak Er 22 II Where the person for whose benefit it is made is  
Bullock 2281 not liable at all for the same debt a duty  
3 Buss 1921  
Rob 209.26.

II II When the liability of the third person for whom benefit the promise is made is extinguished by the promise

3 Buss 1186 III When there is a new consid<sup>r</sup> arising out of a  
3 Buss 186 new and distinct transaction & moving to the  
Rob 232 promisor  
2 East 325.

When the promise is merely in aid of a subsisting and continuing debt a duty on the part of the third person. Or where the promise is made to procure <sup>procur</sup> ~~procur~~ for him a prolong credit for him the promise is collateral.

2 Mil 94  
1 Mil 306  
Lo Ray 1015  
Jack 27  
1 Buss 158.  
Comp 460. Prak Er 22 2 Ey 455. 14 Bl no.

If it comes to a trade man & he deliver goods to J. & I. and charge them to me the promise to J. is original —

22251

1 ABC 120.

If it says deliver goods to J. & I. on no account — no again the promise is original. Again 'Deliver goods to J. & I. and I will pay you' — In all these cases J. is not at all liable, and therefore the promise to J. is good.

22257

Rob 209. 16

If contra it says 'Deliver goods to J. & I. and if he does not pay you I will' the promise is collateral. J. & I. will be his surety. There are in aid of a subsisting and continuing insolvency on the part of J. & I.

1 ABC 120.

22252.

'Deliver to J. & I. and I will see you paid' this was held to be collateral. because it is said that the presumed intent is that J. & I. shall in the first instance be charged — but J. & I. thinks that the expression may be either original or collateral & it is now decided that this form of words is merely prima facie collateral

22250.1

22251

Rob 223.

154 D 155.

Trick 55.

In such a case Lord Mansfield made this distinction if the promise was before the goods were d<sup>d</sup> the promise is original if after then the promise is collateral — but this distinction is not the one finally established —

22251

Rob 209. 10

The doctrine now is that the Ct in collecting the intention may inquire into all the circumstances of the case & the situation of the parties.

184 D 158

Rob 212

223.



J. I. applies for credit the tradesman did not know of  
2-7-1852 A says if you do not know J. I. you know me I will  
Exp. 25, 1852 see you paid. here the promise is collateral  
C. 1 11:11

do, I say to A let a horse to B + I engage for  
talk 27. that we shall deliver him here, the promise is collateral,  
C. 11:24. I. I. is of course here liable on the  
3 talk 15 treatment.

20 Ray 1085

Rob 217-32

20 Ray 1085 I promise that a third person shall do an  
act for not doing which he would be liable is  
collateral

Rob 220 But if I promise that a third person shall do an  
act for not doing which he will not be liable my  
promise is original. Thus A says to B let me you  
have I. I. owe me money. he shall pay you if  
he does not I will. here the promise is original

3 Burr 1424 If an agent buys goods at an auction with naming  
Plak's 213 his principal the agent is bound by his part promise

Rob 219 To make the promise collateral it is necessary that the  
122 person for whose benefit the contract is made should not  
232 only be liable on the same consideration but should  
also become liable at the same time and on the  
same contract. If I direct goods to be sold to  
20 Ray 1085 J. I. and charge them to and J. I. should afterwards  
1037. promise to pay still my promise is original.



If a promise is made by only ~~one~~ of several debtors to pay the whole debt the promise is original 5 Colloz 205  
Thus where costs were taxed ag<sup>t</sup> two Defts — Com 6362

2 East 325.  
2 Ex 4184

When the promise is original according to the debtors the action of indeb. assumpsit is a proper action also 1 Bay 373  
debt may be maintained. 3 Lev 363.

But where the promise is collateral, debt a indeb. assumpsit will not lie (the proper action is a Robt 216.  
special action on the case —

2<sup>d</sup> When a promise is made in consideration of the extinguishment of the debt of a third person 3 Burr 1588  
for here the promise is not in aid of an existing debt and continuing liability, nor is it for procuring credit or prolonging credit for another & therefore such promise is original — 1 N.R. 130:1  
Robt 223 1 N.R. 130

When the promise is purchase of a debt due to the maker from another the promise to pay for the transfer is without doubt an original promise. 2 East 325.  
Robt 226.

3<sup>d</sup> Where there is a new cove<sup>n</sup> arising out of a new & distinct transaction and moving to the promisee.

- 31 Burr 1186  
2 Ackr 213  
2 East 325  
3 Ex R 16.  
1 Do 1214  
2 Selw 558  
10 John 412  
15 John 425  
1 Com R 579  
17 Mass 219  
31 Burr 1186  
2 Ackr 213  
2 East 325  
3 Ex R 16.  
1 Do 1214  
2 Selw 558  
10 John 412  
15 John 425  
1 Com R 579  
17 Mass 219
- Where rule in other words thus If a creditor has a lien on his debtor's property & promises him the amt of his debt if he will relinquish to me his lien this is an original promise - The only example under this rule is the case of West v. Kefer & Hobditch v. Milne 3 Ex R 16.  
The truth is this was the purchase of an interest from the promisee and had nothing to do with the Statute.  
vide Salk 25. 2 Ray 759. 1 Esp 56. Salk 25. 3 East 325.

Another class of original promises. - Where one is under a moral oblig<sup>n</sup> to pay for a benefit to another the promise is original & therefore the parol promise is binding - Thus where an apothecary furnished medicine to a pauper on application of the pauper alone and the overseer of the poor promised by parol to pay the apothecary the promise was held binding -

1 Mills 305  
7 J R 204  
Peake 214  
Rob 208:334

The promise to pay a certain sum in consid<sup>n</sup> of the promisee's withdrawing a suit ag<sup>t</sup> him for an assault & battery was held original.

2 Esp 457.  
2 Selwyn 157

Where a husband & wife jointly owned a house & the husband promised to pay the mortgage - His wife's promise was collateral - He was sued for the mortgage &c - His promise was on the ground of a new compromise - No actual compromise was made.

To bring a promise within this clause there must have existed at the time of the promise a debt or duty capable of being ascertained or actually ascertained -

A promise to pay in consid<sup>r</sup> of the promisee's staying a suit ag<sup>t</sup> D for a Debt is collateral (Am 6330). contra 3 Dam 1887.

2 Mil 94

Rob 208

233:4

3 Dam 1887

Str 873.

A promise to pay in consid<sup>r</sup> of the promisee's withdrawing an action of trover ag<sup>t</sup> D is collateral. In trover the rule of damages is the value of the goods converted & therefore here the debt is capable of being ascertained and was so at the time of the promise. — Suppose the action had been trespass I think the promise w<sup>d</sup> be original. for here the damages are presumptive.

2 Day 455

relays 53 (2)

A promise to pay B a debt in consid<sup>r</sup> of withdrawing an action to recover <sup>that</sup> debt the promise appears to be original for ~~the~~ retraction is an extinguishment of the debt — but in our practice a retraction is no extinguishment.

3 Bl 296

When there arises a new consid<sup>r</sup> it is said that a promise to answer the debt of another is collateral. But this cannot be law witht<sup>h</sup> repealing this clause of the st. for witht<sup>h</sup> a new consid<sup>r</sup> the promise at E is void —

Am 6330

3 Dam 1887

—

2 Mil 94

Buller & P 251:2

2 Day 457

77 R 201. Str 873.



22 Ark R 15  
22 Ark Ex 204  
Rob 238.

A judicial confession by the Deft which makes  
all proof unnecessary will prevent the application  
of the Stat. Ex: gra If it is sued on a collateral  
promise by parol & pleads tender & pays money into  
Court the St will not be applied - for here is  
no necessity of proving the promise

The parol promise is not as such made void by  
the Stat. it merely declares that no suit be  
shall be maintained upon it. the only effect  
of it is to exclude all proof of the parol promise.

When it is necessary that the promise sh<sup>d</sup> be  
in writing, it is not necessary in the declaration  
to aver the writing it is suffice that the writing  
appear in evidence. for the St introduces only  
a new rule of evidence not a new rule of pleading!  
1 Saund 9a, note 1. 2 Ch R 214. n. to o., (1 Ch R 228 contra)

7 J R 380 (n) A demurrer to a declaration on a collateral  
promise admits the promise to be in writing  
for under a demurrer it cannot be objected that  
the promise is not in writing the demurrer  
excludes all proof of writing.



## Contracts (124)

When there is an entire parol contract to do a thing within the Stat and a thing not within the Stat the whole contract is within the Stat. there can be no promise of an entire contract.

When all the parts of a contract a promise that each be sure upon one and the same consideration the parts make an entire contract provided so

204.  
L. 150  
2d 12 177  
231

III If agreements in consid<sup>n</sup> of Marriage.  
This clause does not relate to the promise of marriage but refers to family settlements &c.

(Ball M Per 8  
M. 277:8  
L. 176:4  
L. 34  
L. 176:18  
Per in Ch 526

It was formerly doubted whether a parol agreement of the kind would bind the parties if it was a part of the parol agreement that the contract should be reduced to writing. but it is now settled that such stipulation has no effect.

Rec in Ch Hor  
3d 504.  
Per 279. 281.

If the agreement does contain such stipulation & the execution of it is prevented by the fraud of either party & the marriage takes effect Equity will enforce the agreement against the fraudulent party — for whatever is made the instrument of fraud is provable by parol in Equity.

Equity 9  
Col 198.  
136:7  
Per in Ch 526  
10 M. 618

Agreement in consid<sup>r</sup> of marriage.

A letter signed by the party to be bound containing  
2 Broch 32 the terms of the agreement is a note or memorandum  
3 Broch 318 the Statute.

1 Foul 179.

Rec in Ch 560

3 Ark 503.

But it must appear that the other party accepts  
the terms contained in the letter and proceeds  
2 P M 65 in the marriage in contemplation of the terms  
1 Foul 179 in the letter.

193. Where the party to whom the offer in the letter  
9 Mod 3. was made was ignorant of the offer in the letter  
1 Bond 287 at the time of the marriage a Co of Eq: will not  
290. enforce the agreement. here was no mutual assent

3 Ark 503 A letter written to one's own agent stating the  
Rob 121 terms of a parol agreement is a suff<sup>t</sup> note or  
memorandum: here the parol agreement was enforced

Rec in Ch 560 But when a letter is the evidence relied upon  
Str 426 it must furnish distinctly the terms of the agreement

10 Ark 12.

1 Foul 179.

2 Eq Cas 7.

A written recognition after the marriage  
of a parol promise before marriage will  
not take a case out of the statute. Madd 297  
12 Ves 73. contra Viney Abr tit con<sup>t</sup> Agreem<sup>t</sup> (H/c 34)  
+ 2a,

#### IV Contracts or sales of lands tenements &c

By the words 'contracts or sales of' is meant contract for the sale of land & sales of land &c.

If a thing annexed to land is sold in contemplation of severance from the land it is not within the East 60r Statute. a parcel sale of grass standing counts 11 East 362 is good & a sale of trees growing on land

2dels AP 162

16 Com C 746 10

Bull AP 182. 1 B & P 397. 3 Bay 476. Peck 6 2144.

It has been held that a sale of a crop of potatoes 2dels 162 is within the Stat. and given - contract 162:3. 11 East 60r.

An agreement by parcel between the owner and the occupier that each shall share a certain portion of the crop is good. this agreement is made with a view of severance -

1 B & P 397

2dels 863:4.

The same doubt once arose under this clause 11 East 119 as under the former whether a parcel agreement 16 Com 14 containing an agreement to reduce it to writing 11 PM 4770 might not be good now settled that it is 2dels 162 not good 2 B. & C. 355:6.

It has been held in Court that a parcel promise 1 Root 77:8 to pay the purchase money of land is good 3dels 479. and supposes the promise made when a good conveyance of the land is made.



contracts or sales of land.

But part agreements for the sale of land are in some cases good - viz when they are provable consistently with the spirit of the Stat & with the rules of Evidence. - & as it does not make such contracts void it merely says 'no right to shall be maintained on the contract. & as it merely introduces a new rule of evidence

1 Ves 221. 441. If on a bill filed for the specific performance of a parol agreement for the sale of land the Deft 374. by his answer confesses the agreement he is bound 3 Atk 3. by it. because here there is no necessity of 2 Atk 100. 35 proof and no danger of perjury. - much 1 Bl R 600. doubt however prevails concerning this rule - 2 Broch 567. Amb 586. 1 Bro 271. 72

If the Deft in his answer confesses the agreement 2 Broch 506 and does not plead the Stat it is agreed by Parker 216 all that the agreement will be enforced 4 Ves 9. 23 Rob 156: 61

So if on a bill filed the Deft submits to Rob 156. such a decree as the L<sup>rd</sup> sees fit to make the L<sup>rd</sup> will enforce the agreement tho' by parol

Re 159: 60 But it has been held that tho' the Deft does confess Rec in C 108. the agreement in his answer yet if he pleads the Stat 374. the agreement cannot be enforced - But vide Parker 216. 3 Atk 3. 2 Atk 155. 2 Broch 508. 6 Ves 37. 554 12 Ves 466. 7 am 58. 1 Peten R 380

In 1 Bl R 600. Li Mansf says that if the Deft answers & confesses the agreement will be enforced 2 H Bl 635. But in these cases (contra) 2 H Bl 638. 4 Ves 545. 2 Broch



In 2 Mo Ct 559. Id Thurlow allowed the plea of the  
St when the Deft answered with denying the agreement  
But Lord Thurlow refused to decree on account of  
the peculiar circumstances of the case -

Roberts says that ~~that~~ it appears to be nearly  
established that if the Deft pleads the Statute  
the Ct will refuse to decree <sup>tho'</sup> if the Deft confesses  
the agreement in his answer.

But I think that the pleading of the Statute  
can make no difference -

But it has been a question whether a debt in Ch or  
a bill filed for the specific performance of such a  
contract must answer the agreement -

1 For 170  
Ott 241  
Rob 147 (u)  
2 W Sig 30.  
Madd 305.  
14 Ves 375.  
Silt Eq ca 35.  
contra Child v  
Godolphin  
Deck 39.

2 Broc L 566.  
Kitt 241, 12  
Rob 156:7  
160.  
4 Ves 24.

Id Thurlow held that the debt must under  
oath either confess or deny the agreement. 2 Broc L 567.

If then the Deft denies the agreement it cannot  
be decreed.

The argument agt this rule is that it lays the  
Deft under a temptation to commit perjury, but  
this holds equally in every case where a party  
is required to make answer - but the Perjury  
of the Deft is not that agt wh the Stat is  
made.

Contracts or sales of land.

of part agreement for the purchase of land at a vendor sale before the master will be enforced in Chancery. because the Ct hold that such confidence is to be placed in its officers that there is no danger of perjury.

Rob 115.

1 Bos 271:4

of part agreement between the two solicitors in 3 Brock 334 Chancery in a suit between mortgage & Rob 115. mortgagee was decreed by the Chancellor because such confidence is placed in them that the Ct. will consider no danger of perjury.

of part contract concerning an interest in lands if inferible from circumstantial facts which can be proved with danger of perjury is said to be binding.

3 Mor 429

Talb 60

It where one made an absolute deed of land & the vendor rec<sup>d</sup> the <sup>and gave an obligation to</sup> money, remained in possession &c &c This was decided to be a mortgage by the 8th 4 Am 52 Co<sup>t</sup> but overruled by our Supreme Ct. - This rule is founded entirely upon dicta.

314 712

714 347.

Reun: D. R 49. 50.

Other exceptions to the genl rule are admitted on the principle that an act made to prevent fraud should not be so construed as to protect fraud. therefore a Ct of Chy will decree a performance when such decree is necessary to prevent a greater fraud

2 Bos 294:6

17 Feb 171:2

1 Bl R 601

Rob 131:2:8

Hence if a parol agreement has been performed or partly performed at the request or with the consent of the other party a Co of Chancery will decree a performance in favour of the party having thus partly performed.

17 Feb 1721  
1 Bro C 296.  
1 Ves 221. 247  
Stra 783.  
3 Atk 100.  
1 Ves 83.

9 Allod 37. 1 Bro Ch 117. 7 Ves 341. 3 Woodes 433:5 2 Eg: cat 41: 3 Ves 378.  
1 B & P 397. 4 Cr 51: 2. 3 Ves 712. 7 Ves 347.

Delivering possession of land by the vendor in pursuance of an agreement to sell a lease it is a sufficient performance on the part of the vendor -

2 Vern 363  
455  
2 Eg: cat 48  
Rec in Ch 518  
7 Ves 747  
Stra 783  
3 Bro Ch 409

If a purchaser being let into possession builds on the land this is a sufficient performance on his part.

1 Madd 303:4  
1 P M 770  
2 M 37

Again payment of money as part of the consideration of a parol purchase has been held a sufficient performance on the part of the vendee - But this is denied 2 Eg: cat 46. Sudd L. 1. 74: 81.  
1 Comm C 82. 9 Ves 234. 1 Madd 302: 4.  
1 Ves 221. 3 Ves 383. 712. 6 Ves 32: 7.  
1 Scob & Le Troy 440. 2 B 5. 2 Cairns 109. 4 Cr 48: 2.

Rec in Ch 560  
3 Atk 2  
11 Ves 222  
4 Ves 720  
3 B 713

I think that the law in Eng<sup>d</sup> now is that part payment is not a sufficient performance for the party paying may bring in a sum of money.



Contracts or sales of land.

21st 394. In Conn<sup>t</sup> the rule has been established both  
22nd 225. ways.

23rd 360. The part. of earnest on either side at the time  
17th 175 of making the agreement has no effect. for this  
is in no sense an act of part performance.

18th 308. Mr Port says that if one of the parties pays  
19th 109. earnest he may recover damages in an action  
at law for the non performance of a parcel  
contract for land - if so then the payment of  
earnest binds the parcel contract, which is contrary  
to all authority.

6th 445. To take the contract out of the stat on the  
7th 341. ground of part performance the act done must  
18th 138. be one which would be injurious to the party  
162. performing were the parcel contract not  
performed by the other -

Again the act done must be such an act as  
in the opinion of the Ct would not have  
3rd 378 been done but with a view to perform a  
12th 139 181 parcel contract. ex. gra! When a  
162. man contracted for a new place by parcel  
18th 308. and continued in possession after the old lease  
19th 412. had expired this was not considered as a suffe  
20th 561. part-performance.  
21st 516.  
17th 175.



giving directions for a conveyance, intending to  
view the premises &c. is not viewed as act  
of part performance.

1 Fon 175.

1ellad 373. 4.

1Brook 412

Over 41. 32634. 379. Amb 586.

And marriage is never such a part performance  
of a parole agreement as to take in parole agreement Dec in Ch 56  
out of the Stat as between the parties to the marriage. 183.  
for no marriage agreement is by 10 P M 618.  
the terms of it, to take effect unless the marriage 1809.  
takes place. if then marriage is taken the 1810. 8.  
case of the Stat the Stat would have no effect.

But a parole contract made by a third person  
in cons. of marriage may be taken out of 21 Jan 373.  
the Stat by the marriage if the marriage 1809. 297.  
takes effect by the consent of the third person 309.

The selling of timber in pursuance of a marriage  
settlement agreement has been held a part  
performance to bind the other party. 1809. 297.

A written contract (to prevent fraud) may be 3ack 309  
contradicted by parole provided this will prove 1706 18.  
a fraud in the execution of the written instrument 1809. 297.  
whether the contract was concerning land a 20th 203.  
any thing else. 1809. 297.  
1809. 297.

Contracts or sales of land.

Again a parol agreement respecting land to  
may be proved by parol where the agreement is  
merely inducement to an action of fraud

And whenever there is a mistake in recital of  
fact in the draft of a written instrument the  
parol agreement on which the instrument is  
founded may be proved on a bill filed for  
that purpose.

1 Ves 457.

2 Ves 376.

17 Eq 188.

193.

1 R 433.

3 Atk 389.

6 Tr 671.

Ex 1920

165.

6 Tr 327

2 Bl 149

15 R 378.

1 Will 314.

14 Bl 285.

4 Atk 34.

17 Eq 284.

10 Bl 197

3 Mod 152

Calder 137.

2 Comyn 389.

Deak 241.

17 R 378

Ex 1920.

Since the act of fraud by 11 Reg 2<sup>d</sup> an action of  
inde abumpost will lie for the use & occupation  
of land and parol proof will  
be admitted to ascertain the measure of damage.

We have no such act. but the rule introduced  
by this act is settled in law tho' by the  
English ex agreement never would lie for rent

but this action for use & occupation will  
lie when there is an express promise to pay  
rent on the implied contract. but here the  
possession of the land must be shown to be shown  
not to be adverse —

Under the clause relating to the sale of goods of the value of £10.

It was once supposed that this clause extended only to executed contracts & that executory contracts were not by the Stat required to be in writing nor to render them binding was counsel or party delivery necessary but it is now established that executory contracts for the sale of goods are within the Statute  
10 John R 263:4. Bessel & Hull. 7 T.R 14. 4 Stark 609. 2 B & C 68.  
4 Stark 1617.

This distinction is however taken. Where the goods or articles contracted for do not exist at the time of the contract but are to be constructed by subsequent labour there the contract is not within the Statute tho' the materials to be employed do exist.

In such cases the contract is considered rather as a contract for work & labour than for the sale of property. 1 Stra 506. 3 M & S 178. 4 Burr 2101. 5 B & A 615

In Clayton v Andrews 4 Burr 2101 the contract was for corn which at the time was not thrashed, but was as it thrashed &c.

But if the goods exist in solids at the time of the sale the case is within the Statute. tho' by the contract the vendor is to deliver them at a different place. 7 T.R 14 &c

By the 9<sup>th</sup> of Geo: 4<sup>th</sup> the provision of this clause of the Stat of frauds are made to extend to contracts 'notwithstanding the goods may not at the time of the contract be actually made'

10 Bing 99.

Where several articles are purchased at one & the same time tho' at different prices the case is within the Stat: if the whole am<sup>t</sup> be £10. tho' no separate article am<sup>t</sup> to that sum. 2 B & C 37.

The delivery to satisfy the Stat must be not only a delivery by the vendor but must be accompanied with an acceptance by the vendee.

The modern English doctrine is much more strict than it formerly was, in requiring that the vendee must take actual possession of the property in order to render the contract binding where the other requisites of the Stat<sup>t</sup> are not complied with.

And the modern doctrine seems to be that the delivery must in general be so complete as to take away the vendor's lien for the price  
Stark 4<sup>th</sup> part 1618 note. 2 B & C 37. 5 B & A 855. 3 B & A 650.

the former doctrine was much more relaxed, thus  
1 Taunt 458. purchaser of a horse requested vendor to keep him & the vendor removed the horse from one stable to another.

1 Camp 233. cutting off spilly of a pipe of wine & marking the purchaser's name on the cork,

So formerly delivery on a parol order to a carrier was suff<sup>t</sup> to take the case out of the Stat  
3 Camp 528. 3 B & P 583. 8 T.R. 330.

But it seems that now such a delivery is not suff<sup>t</sup>  
3 B & A 321. 5 B & A 557. *Hanson v Armitage*.  
10 Bingham 376. delivery on board a ship chartered by the def<sup>t</sup>

But now where the goods are ponderous, I suppose more symbolical delivery is suff<sup>t</sup> as Key &c. 4 Stark 609.  
2 Esp C 698. 3 John 399.

And an acceptance, if complete, of part of the bulk is suff<sup>t</sup> to answer the requirements of the Stat  
7 East 558.



V<sup>th</sup> Every promise to pay &c which is not to be performed within one year from the time of making, must be in writing.

This clause does not extend to any agreement concerning lands, tenements &c.

Warr 57  
100 270.

Where the performance of a parol contract is to take effect on a contingent event which may or may not take effect within one year the contract is not within the statute. Ex a promise to pay \$100 for B's marriage — or promise to leave B \$100 by will.

Ball 4 Pr 280  
3 Burr 1278.  
3 Dalry 7  
Peak E 214  
12 Ray 316

To make a parol promise binding under this clause there is no necessity that the contingent event sh<sup>d</sup> actually take effect within the year —

3 Burr 1278.  
12 Ray 317

This clause then extends only to agreements not by their express terms are not to take effect within one year —

(16)  
Peak E 214.

VI Contracts for the sale of &c above the value of 100

In this class the consideration need not be inserted in the writing, owing to the phraseology, the word bargain is here used instead of agreement. Agreement includes consideration bargain not.

East 307.

R  
Rules applying to all the six classes.

- 1 BLR 600. The construction of this Stat is the same in law  
1 Forb 22 as in equity. tho' the relief afforded in these courts is  
3 BL 6430 diff<sup>t</sup>  
431.

No suit to shall be unless the agreement itself  
or some note or mem<sup>o</sup> in writing.

- 1 Forb 179 Every writing intended to furnish evidence of the  
1 Pou 267.8. agreement is an agreement a note or memorandum  
2 Bro Ch 32. writing within the Stat. provided it be duly signed  
3 Do 316 & in fact does disclose with reasonable certainty the  
3 Ark 503. terms of the contract.

The terms of the agreement may be made suff<sup>t</sup>  
3 Bro Ch 318 certain by a reference in the writing to other  
Rob 107. documents or to extrinsic facts.

115.  
1 Ves Jr 330.  
2 B & P 235.

But where the written agreement refers to something  
1 Ves Jr 326 extrinsic if the subject is not made certain  
Rob 108 (14) by the thing referred to no parol evidence is  
admissible to make it more certain.

Suppon the mem<sup>o</sup> is silent as to price will it a suff<sup>t</sup>  
mem<sup>o</sup>? 10 Bing 376. 2 B & C 583. It seems, in gen<sup>l</sup> it will 10 Bing 482.

An advertisement containing the terms is  
1 BLK 599 a suff<sup>t</sup> note or mem<sup>o</sup> of it. Such notice may  
3 Binn 192. amount always to a contract. Ex ora p<sup>ro</sup> reward  
to him who will return goods stolen.

And an instrument intended as a deed may  
still be a good ex ory agreement in equity where  
it fails to operate as a deed for want of  
due formality or on acct. of some change in  
the relations of the parties.

Signing

But when the name written in the body of the instrument is not intended to give it authenticity, this is no signing.

12 May 77  
18 Jun 85  
17 Feb 1867  
Rel 121.

But one's signature as a subscribing witness has  
he knowing the contents of the instrument or Miss M.  
suff. to bind him to any stipulation on his Robt. H.  
part contained in the writing.



in this signing as a witness was intended  
to give authenticity to the instrument  
and this might fairly be considered as  
an adoption of the deed by herself

### Who must sign?

The party to whom the claim  
is made is all which is necessary provided  
it is necessary shown that the party  
assented or acquiesced. but if the C.  
decree agt. the signing party it will only  
be on condition that the Plf perform his  
part. — Rule doubted but well settled.  
(Rob 117 p 124. Newland 171. 155. Engd 64.  
1 Sch & Leffroy 20. 1 Madd 335.

If A draws an agreement between A & B &  
procures B to sign it is said to be bound  
The principle of this rule cannot be discovered  
all Mr. Pond says that C's procuring B to sign  
is a signature by C — the rule was held  
because in equity if one is bound the other  
ought to be — but admitting B to be bound  
and A not still in equity B cannot be  
compelled to perform unless on the express  
condition that A shall be bound

If the agreement be signed only by the party  
seeking a specific performance it is clear it will not  
be decreed (Pur 770. 1 Vern 221.

an auctioneer is subscribing the highest  
bidder's name is held to be a purporting  
for the bidder for he is agent for both  
parties. \* This rule is now held to apply  
only to the sale of goods at auction under  
the 6th clasp 15 Exch 107. 1 B & P 306. 110 p 344.  
13 R 151. Plak Co 217. — 1710 p 247. 1 R 115



x Note - 2 Taunt 38. 4 Taunt 209. Now sett. that agent need not be authorized in writing under the clause & that Auctioneer is agent for purchaser on sale of real estate and may bind the purchaser by writing the purchaser's name on sale of real estate.  
x When the subject matter is land it is well settled that the signing by the auctioneer is not suff.

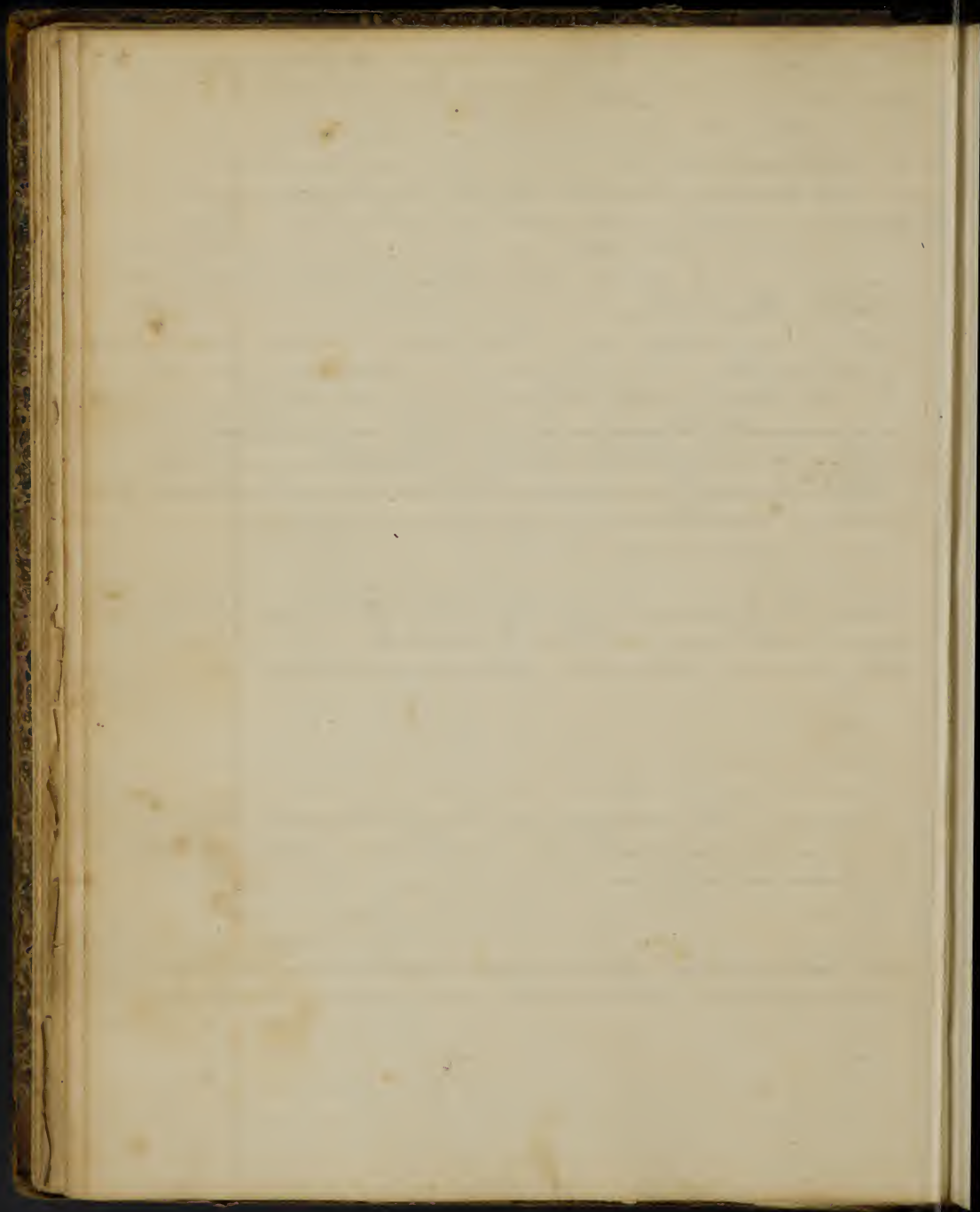
It has been doubted whether an ante 1 Bl 260  
uction is within the stat. for it is s<sup>d</sup> to 3 Bm 1921.  
be so public that, there can be, no danger of forgery. I think that they must be 2 Stark 808  
within the stat. 2 Rick 64.

It is not necessary that the name signed sh<sup>d</sup> be in c<sup>o</sup>graphy. It may be by plate a printing 2 B & P 38  
by typark where the party can't write. - Rob 124.  
The rule supposes indeed that the printing should be adopted as a signature. so signing with a lead pencil is suff. 2 Kent C 511.

Where the signing is by atty the atty should sign in the name of the principal - but 3 Moore 427  
the power of atty need never be in writing. 9 W 251.

And any acknowledgment in writing signed by a parted contract is suff as a note to a memo in writing 3 B & P 318  
3 B & P 503.  
Rob 121.

The bare writing of an agreement with a party's own hand does not amt to a signature. 3 Bm 770  
Rob 121.



## Contracts. 105.

### Consideration.

According to the definition of a contract a consideration is of the essence of every contract. This is universally true of every contract independently true of contracts executed.

The term Cons. is the material cause of the undertaking on either side.

By C & S cons<sup>s</sup> are good & valuable. good is that of kindred or natural affection between near relatives. and the relation to which a good consid can extend is that of Uncle and Nephew. and no further except in case of an heir at law.

A good consid is in contracts executed as between the parties to it. but as against third parties bona fide purchasers it is in itself not sufficient. vide Grant & Convey.

In every contract on good consid may in some cases be enforced in Equity never at law.

A valuable consid<sup>r</sup> is one consisting of some pecuniary value - as money. land goods marriage labour &c.





The rule that a consid<sup>r</sup> is necessary applies to its full extent to executory contracts. i.e. promise to make you a gift

Long 201

Tha 955

Epist 571

But a contract executed by the delivery of the subject is good as between the parties - i.e. q<sup>u</sup>o

deed of conveyance with consideration. i.e. the rule is a promise to give the subject to you, paying a price, is a contract as between the parties. i.e. the rule is a promise to give the subject to you, paying a price, is a contract as between the parties.

It has been said that a consid<sup>r</sup> can arise 1<sup>st</sup> only from something advantageous to the promisee or from something disadvantageous to the promisor. Rule too narrow. (vide post).

128342

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A consid<sup>r</sup> may arise from something advantageous to the promisor. — The amt. of consid<sup>r</sup> is immaterial. i.e. a pepper corn is a suff<sup>t</sup> consid<sup>r</sup> to support any promise. but a rust is not suff<sup>t</sup> —

2 Ken 215

1 M & 130

2 Ves 510

Idle and insignificant cons<sup>r</sup> are no consid<sup>r</sup> in the law Ex promise in cons<sup>r</sup> that that promisee shall not smile.

Epist 94

Co E 206

1 P & 355

2 R & 13

But any act however trifling to be done by him the promisee is a suff<sup>t</sup> consid<sup>r</sup> — Ex showing a lease.

Ex 67. 150.

Ex C 70.

1 P & 343.

Consideration is the price paid for the promise. i.e. the rule is a promise to give the subject to you, paying a price, is a contract as between the parties.

53 R 373.

2<sup>d</sup> Consid<sup>r</sup> may arise from something disadvantageous  
to the promisee. Ex destroying a house aft. J.S.  
1064.5. 1101.34.  
1101.34.  
1101.34.5.  
1101.34.5. 1101.34.5. 1101.34.5.

1101.34.5. But a contract is not supported by a consid<sup>r</sup>  
1101.34.5. altogether past & executed. For here the  
2 Bull 75. promise is, not the procuring cause of the cons<sup>r</sup>  
1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5.

1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5.  
1101.34.5. But if any of the cons<sup>r</sup> remaining at the time of  
1101.34.5. the promise that part will support the promise.  
3 Salk 76.  
1101.34.5. 1101.34.5.

3 Bull 167. 1101.34.5.  
1101.34.5. A contract on a cons<sup>r</sup> past & executed is  
1101.34.5. however good if there was a previous duty  
1101.34.5. existing before. Ex promise in cons<sup>r</sup> of a debt  
1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5.

3 Bull 167. 1101.34.5.  
1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5.  
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1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5.  
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1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5. 1101.34.5.

It was strange to a notorious act done by  
another cannot support an action in his own  
name upon a contract founded upon the  
act.

10th 343.53

17th 330

6th 637

10th 66

But the rule is now qualified - The rule is now  
inferred to deeds entered parties. When the contract is by deed  
is by deed the stranger <sup>may</sup> about subseq<sup>t</sup> ratify  
the contract in his favour. But a man cannot  
by about subseq<sup>t</sup> make himself party to a deed  
expressly made between other parties.

2d 1214.12

10th 137

10th 140

10th 140

10th 219

10th 117

10th 117

10th 117

And in the case of a parol contract the stranger  
sh<sup>d</sup> count upon a promise made to him for  
this is the legal effect.

10th 101

A con<sup>tr</sup> moving from one person will support  
a promise in favour of another who is his  
near relative.

10th 11

312

10th 110

10th 102

10th 115

But according to the later cases (ante) there is  
no necessity for such relation in a parol contract.



When the forbearance of a suit is the consideration  
there are two requisites. 1<sup>st</sup> it must be for ever or for  
120. 353.4 a fixed period. 2<sup>d</sup> there must at least be some  
breach of liability on the part of the promisor.

121. 455

Exp<sup>d</sup> Dig 95. rule 2 compare 410-1 to 4 John R 237.

But a promise to forbear for a month is a good  
consideration for a promise to pay - a promise to forbear  
(Pl) for a reasonable time is a suff<sup>t</sup> consid<sup>r</sup> for the  
Hutt 150 by jury determine what is a reasonable time.  
Exp<sup>d</sup> Dig 95.

1<sup>st</sup> of promise by a woman to pay a debt  
3 Salt 96 due from her son who was dead if the Cr. would  
Hars 73 not sue her - here there was no colour of liability  
100. 354.5. of course no suff<sup>t</sup> consid<sup>r</sup>. again on another  
Exp<sup>d</sup> 594 on void promise & another promise in consid<sup>r</sup>  
of his being released this promise is void.

Still a promise in consid<sup>r</sup> of forbearing a suit  
Litch 142 is good if there is a colourable liability on the  
100. 356 part of the promisor. Ex<sup>t</sup> a promise by Ex<sup>r</sup> to  
pay a debt due from the ~~testator~~ intestator on inf<sup>r</sup>.

The mere act of entrusting property to another on  
La Ray 909.10 the promise of another to something with it is  
919.20 a suff<sup>t</sup> consid<sup>r</sup>. Ex a tailor promises to make  
500. 153 a garment for me gratuitously he may refuse  
Salt 26 to receive the cloth. but having received the  
Compt R 153. cloth he must make the garment -  
3 Salt 11.



The consideration of preserving the honor of a family has been held suff<sup>t</sup> in Chaucery.

14th

So also the compromise of a doubtful right is suff<sup>t</sup>.

14th 10

11th 4

2 Ves 284. 11 R 363.

2 Vent 353.

And it is not necessary that the consid<sup>r</sup> be expressed in direct terms as a consideration for it from the term of the contract the C<sup>r</sup> can collect a consideration it is suff<sup>t</sup> -

1 Ves 450

1 R 368.

Contracts with reference to their consideration are of 3 Kinds. I. Where that wh<sup>ch</sup> is stipulated on one side is in consideration of performance of what is stipulated on the other. Ex. A agrees <sup>to day</sup> to pay B ~~to day~~ for performing something tomorrow. here performance is a condition precedent to a right to recover the reward. If then B sues he must aver performance or his declaration is bad. but if B tenders performance in law he has performed.

1 Vent 177

214

3 Ball 95.

Hob 106.

1 Ves R 240 (p)

14 R 274.5

7 R 130

17 R 638

645

2 S Ray 616.

Str 1236.

7 R 125. 1 East 203. 208. 219. Long 259.

II. Where performance on both sides is to be concurrent. here neither party can compel the other to perform until he has himself performed or done what is equivalent. Ex. A promises to deliver to B on Monday next a load of wheat & B promises to pay on the same day. A can't sue B for the money until he has tendered to the wheat. neither can B sue for the wheat until he has tendered the money.

2 Ves R 240 (p)

1 Saund 320 (p)

1 East 203

619. 619

7 R 125

4 R 761

8 L 366

14 R 363

If a place of performance is appointed & one party is then prepared to do his part & the other is not there at all there is no necessity of going through the empty ceremony of making a tender.

1 East 208.  
208.  
7 ER 125.  
4 Do 761.  
Salk 113. Doug 688.

For Examples vide  
1 Saund 320 a & b. 1 Fonb 381. 1 Poul 358. 2 St B 359. 6 ER 572.  
7 ER 135. 1 Mod 462. 12 ER 118.

1 Saund 320. If a day is fixed for pay<sup>t</sup> and no time fixed for  
2. ER 133 doing the stipulated act the money may be  
sued for before the act is done.  
In such cases the intention of the parties is  
manifest that the money should be paid whether  
the act is done or not.

Salk 171 But if I promise to pay I £100 in six months  
3 Salk 95. in consideration of his doing the act in five  
1 Poul 358. months I cannot sue me for the money until  
1 Saund 320 (dancing performance).  
12 Mod 462.  
2 New R 240 (bail).  
Reg 2 665. (Contra Dyer 76. 1 Roll 114. 115).

III. When the promises are independent or when the promise by one party is in consid<sup>n</sup> of the promise by the other, here either party may sue witho<sup>ut</sup> averring performance on his part. A & B agree thus I covenant to pay B \$100 in consid<sup>n</sup> of his promise to deliver me a load of wheat & v.v.

Dmg 65  
1 Inst 177 214  
4 Co 55.  
Salk 24.  
5. Ho 2411.  
Salk 37:00  
Hard 102.

But in such a contract, a Co. of Eq. will not decree performance unless he who prays a decree shows performance a readiness to perform, and the decree will frequently be conditional that the one shall perform when the other does.

1 Fon 383.  
7 Bro 20 14.  
2 Fran 35.

I promise to pay J. \$100 on such a day he transferring so much stock to me. And J. promises to transfer & paying so in this case the promises are dependent and neither can sue witho<sup>ut</sup> alledging performance on his part.

Salk 112  
2 Mod 503.  
4 D 270.  
4 D 761.  
1 Fon 312.  
2 Col 663.  
5 D 372:5.  
2 D 2 1312.

The question whether promises are dependent or not is to be determined not of course by the order in which the things are mentioned but from the meaning & understanding of the parties as connected by the spirit & nature of the contract.

1 D 645.  
7 D 30.  
1 D 570.  
6 Co.  
5 D 373.  
1 D 65.  
2 Fea 2406.



Of late Cts are inclined to construe the  
1. 1761. contracts dependent where possible. -  
8. 7 C 371.  
Miller 496. 1 East 619.

Where the promises are independent it is said  
both must be binding & neither is

Row 360  
Walk 24.  
Hob 88

and the undertaking on both sides must be  
at the same time - for in such case it is  
promise for promise & if one is void there  
is no consideration for the other

But the rule is too broad for a voidable promise  
on one side is a good consider for a binding  
promise on the other

cannot rule is When the promises are independent  
if either of them are void the other is not  
good

2 Co 3:9.  
2 BC 304  
11 Co 27.  
2 Lev 420  
2 Plow 203  
3 Co 290.  
2 Po 145.  
2 Plow 203  
2 Plow 203

It is said in the consider of a contract by money  
and does not in fact simulate it. Ex Bond  
for an unsworn base. but paid in the execution  
will simulate and dead at C. J. Ex. Scrivener is  
directed to draw a bond for \$100 by a marks<sup>10</sup>  
and the bond is drawn for \$1000. The principle  
is, where the paid is in the case the dead is not  
his dead he not about to the contract. but  
in case of paid, in consider the party defrauded  
has the remedy of a collateral action of deceit,  
or of a bill in Chy.



and in relation to contracts executed with  
deed the rule was the same viz that the  
party defrauded must resort to an action of  
deceit. But the rule is now much relaxed. 1 Camp 29.  
Ex or sells B an unsound article & B promises 190:4  
a settled sum in an action agt B he may 4 Espl R 95.  
give in evidence the fraud. V. Tappan on the car 124 E-293.

In know where there is a total fraud in the  
consider of a specialty the Dist may at law. 1 Root 58  
defeat it by a plea of 'non est factum'. 305  
But where the fraud in the consider is only  
partial. only a Ct of Equity can here afford  
relief.

### Construction of Contracts.

The object of construction is merely to  
ascertain the intention.

The contract is to be carried to the full  
extent intended if the words will at all 124 E-372  
support such extent - and sometimes a Ct  
will go beyond the terms for the purpose of  
carrying into effect the manifest intention.

In genl the terms of a contract are to be 124 E-372  
expounded according to their most known 204 E-218.  
and genl meaning. and always unless some 124 E-372  
decisive reason to the contrary. 124 E-372

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8. 1837.  
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It is paid in the consid<sup>r</sup> of a contract by money  
and does not in fact signify it. Ex Bone  
for an insurance case. but paid in the execution  
will vitiate an deed at C. T. Ex *Levinson* is  
directed to draw a bond for \$100 by a marks<sup>n</sup>  
and the bond is drawn for \$1000. The principle  
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his deed he not spent to the contract. but  
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2 Co 3:9.  
2 BC 304  
11 Co 27.  
2 Ler 420  
2 Blw 203  
3 Co 290.  
2 Po 145.  
11 Co 117  
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and genl meaning. and always unless some  
decisive reason to the contrary. 100 E 372. 5. 6.  
Poph 55.  
200 E 213.  
100 E 372. 5. 6.  
100 E 372.



And the same language when applied to  
diff. subject may be construed as meaning  
Blow 86. diff. things — Ex. agreement for 20 bl. of  
1 Bon 374. cider carries merely the cider. but agreement  
for a pipe of wine carries the pipe.

Blow 61 If one makes a lease for twelve months it is  
2 Bl 141 for 48 weeks but for a twelve months of  
1 Bon 375 for 52 weeks this is not the rule of the  
law merchant.

1 Bon 376. Words expressive of quantity are understood as  
they are construed at the place where the  
contract is made.

And yet if money is made payable at  
2 PM 88 a place named its denomination is to  
646. be understood as at the place where it  
1 Bon 407 is payable. Ex a contract here made  
to pay \$100 in New York is to pay 250.

Ex 425 Where the language is ambiguous the meaning  
Ex 212 is inferred from the subject, from the  
415. circumstances, or from the effect. Ex  
Hra 400. a lease with covenant

Ex 273.

37 K 53.

4 R 19.

460 80



So from necessity, it is made, & at least the instrument may take effect as if it were in form an instrument of a totally diff. form. Ex. payment by one pt tenant to another. 2 Rep. 96. Bro & 352 operates as a release & may be pleaded as such. Ray. 117.

Ex. a c<sup>c</sup> covenant never to give a debt. 1 R. 446. this is a release of the debt - for as a c<sup>c</sup> covenant it cannot bar an action. 2 H. 544. 3 H. 298.

Words not precisely certain may receive their construction from its effect thus if the construing a contract according to the ordinary import of the terms w<sup>d</sup> render the contract frivolous &c they may receive a diff. interpretation — 2 B. 155. 1 W. 402. Bro & 205. 3 Leon. 202. 11. 1 P. 382.

So if an annuity is granted in consid<sup>n</sup> of Nov 14 something to be done by the grantee, this annuity will be construed as conditional. 1 P. 383.

Circumstances again may explain thus one disposing goods in another's right and come in his own right grants all his goods only the goods of his own right part. 3 R. 372. 1 P. 388.

As to releases where there is a recital in an acquittance of a particular claim and sweeping words of release follow. the gen. words are restrained entirely to the recital. 1 G. 170. 3 R. 277. Bro & 170. 1 P. 391. 2. G. 243. 1 R. 255.

The above is particularly shown in the case of those  
who are "in full of all demands" must have  
nothing there full effect.  
3d Sept 177  
10th Nov 177 (contra 2d Nov 177)

If after the application of any these rules the  
intention still remains doubtful the contract  
is really construed most strongly against the party  
making the words in the party to be bound  
Pond 395.

1st 177 259

5th 223  
1st 297.  
But where there is an ambiguity in the construction  
of a penal bond the construction is in favour  
of the obligor. for a penalty is obscure in law.  
Ex. a penal bond conditioned to be void on  
the part of a certain person on a given festival  
if not then well two

1st 42.  
1st 400.  
Where the application too of the rule leads  
to the injury of a third person then the  
language will be explained in a way most  
favourable to the grantor. Ex. tenant in tail  
makes a lease for life. the life or the lease  
shall be intended. for otherwise two lives in  
tail will be injured.

When an article stipulated for is not delivered the  
value of the article at the time when it ought  
to have been d<sup>d</sup> is the measure of damages.

Warr 217  
1 Eg. ca 221  
Strait 406  
2 Barn 1010

but there is an exception to this rule where the  
value of the article at the time when a recovery  
is sought is greater than at the time fixed for  
performance. But if the value diminishes before  
the time of a recovery sought the rule of damages  
is still the value at the time fixed for performance

3 Vern 394.  
2 East 211.  
Warr 409

If several deeds or instruments are made at  
the same time between the same parties and  
upon the same subject these are all construed  
as one agreement.



## Contracts (1866).

Until the terms of a proposed contract are accepted  
to on both sides there is no contract & until  
such mutual assent either party may retract

As in bidding at an auction a man may retract 35R 146  
his bid until the hammer falls.

653

1 Pa 261.

334.

Ex Dig }

18.2249 }

As soon then as an offer is made on one side &  
accepted by the other either party by tender may  
compel the other to perform or pay damages.

2 Pa 63. H

If on an offer thus accepted one party pays  
cannot or if a future time is fixed for performance  
both parties are bound, & if the agreement  
is not made before the time fixed for performance

2 Neg 42

2 BL 447. 8

14 BL 363

7 JR 44

1 Pa 330. 1

But if on an offer made and accepted nothing  
more is done and the parties separate the contract  
is deemed to be waived by both parties

2 BL 447

Blond 302.

1. 4 BL 363.

2. 4 BL 316.

2. 4 BL 302.

336. 14

If A agrees to sell goods to B provided B shall  
within 24 hrs agree to take them and make  
known his determination. A is not bound by  
his agreement and he may lawfully dispose  
of them during the 24 hours.

35R 653.

(1 Pa 261.)

Before a right of action has accrued on a  
simple contract the parties may their mutual  
assent dissolve the contract by parol.

Es 9 553.

2 Per 144

1 Per 412

1 Allot 259

12 Do 533.

But after a breach of such simple contract on either  
side it cannot be discharged by any agreement  
except under seal - for here is a consummated  
right of action and this is a right which the  
law will not permit to be destroyed except by  
the solemnity of a deed.

1 Pow 412 to 413.

But when a new agreement is substituted &  
executed this will discharge it, for this becomes  
an accord and satisfaction.

By the law merchant the acceptor of a bill of  
exchange may be discharged by parol after he  
has become liable. and after a parol discharge  
equity will not enforce the contract.

But an agreement may in equity be waived by  
a long delay in enforcing it. and this independent  
of any statute of limitation.

420:1

2 Br & C 116.

2 Pow 441.

2 P Wms

And a contract consummated & executed may be rescinded by one of the parties if there is an agreement to that effect in the original contract. Ex; a defeasance

C. 35  
Comp. 8.  
Long 23  
72 R 201.  
2 East 145.

3 Exp. R. 12. 10 New R 359

But according to Pont. if A contracts with B for property at such a price as I shall name Pont. 415. C. neither party can rescind the contract. - But Pont. may 91 this rule is too extravagant to need refutation

But a contract may be released as well before after as before a right of action has accrued. Pont. 416. and a release may be either express or tacit

An express release is an acquittance under seal. A tacit release may be by some act of the party claiming under a contract

If he who is to be benefited by the performance of a contract prevents its performance the other party is discharged. the contract is not dissolved for the other party may recover and indeed the party prevented is in the same condition as if he had actually performed -

8 C. 41. 2  
60 Litt 206.  
210 ff)  
Bro E 374  
1 Pont. 416. 10  
420. 265.



Again a lower species of contract may be  
merged & depolled by a higher species of contract  
Obo 45. for the same thing. Ex a judgt on a bond  
Eph 164. annihilates the bond  
Call. 1855.  
1 Burr 9. 3 East 251.

Ex 230 (6) But if for a simple contract debt due from  
R to B. B. gives his bond to B. the simple  
contract debt is not merged. for the bond  
is not a substitute but is a collateral  
security

1 Burr 9. The contract of a given degree cannot be extin-  
Guish 579 quished by one of the same degree and the second  
GuE 517 promise is no bar to an action on the first  
817 promise -  
Cham 862.

1 Selw 156 But in such case if the new contract is  
5 Co 117 pleaded by way of accord & satisfaction it  
3 East 251 may bar the action on the first -  
5 Do 232

2 JR 26.  
Stra 416.

But the C. can never recover for more than  
once

There is no merger where a contract of  
a lower nature by way of accord to enlarge  
the remedy is inserted in a contract of a  
higher nature - Here as in other cases  
of the kind the action may be brought on  
the first contract or on the second C.

BroE 644  
1 R & H.  
1 Burr 425  
210. 223



A contract by deed cannot be annulled  
by parol. Co. ligamine - Nor by a  
writing unless sealed 1 Saunders 291 n.l. 2 Wils. 86.  
376.

6 Co 44  
2 Bl 192  
Cro J 254

Pay<sup>t</sup> of a bond is paid to be no discharge of the  
bond - pay<sup>t</sup> of the money due on the bond is  
however a suff<sup>t</sup> plea

11 Nov 450  
416.  
6 Co 254

Same rule of accord & satisfaction this  
must be pleaded at & of the money due on  
the money bond.

2 Bl 192  
7 Mod 144

Where the right and oblig<sup>t</sup> unite in one and  
the same person the bond at law is discharged.  
A Ct of Equity modify this rule

6 Co 130  
Salk 300  
9 deller 62  
2 Bou 254  
10 deller 575

In Court once held contra 1 Day 226. but in  
Pick & Lockwood overruled -

Ex. Obliga and obligee intermarry

10 deller 438.9  
444.

A Contract may be discharged by act of  
law -

8 deller 57  
Salk 198.  
2 D M 218.  
10 Bou 444.5.

Again the obligation of a contract may  
10 d. 268 be discharged by inevitable accident.

1. 609d.

1. 604. 7. 8.

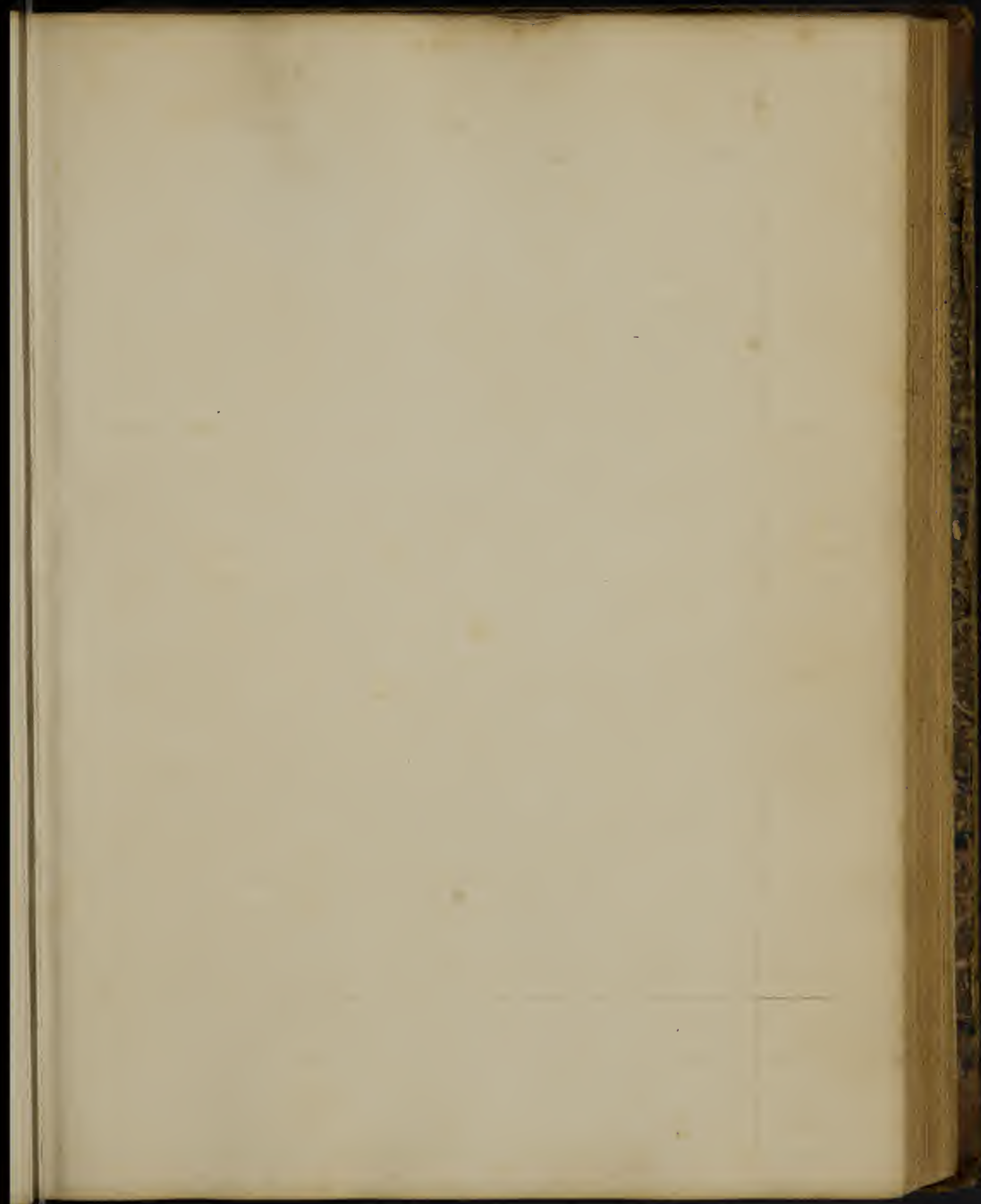
1. 60. ca 18.

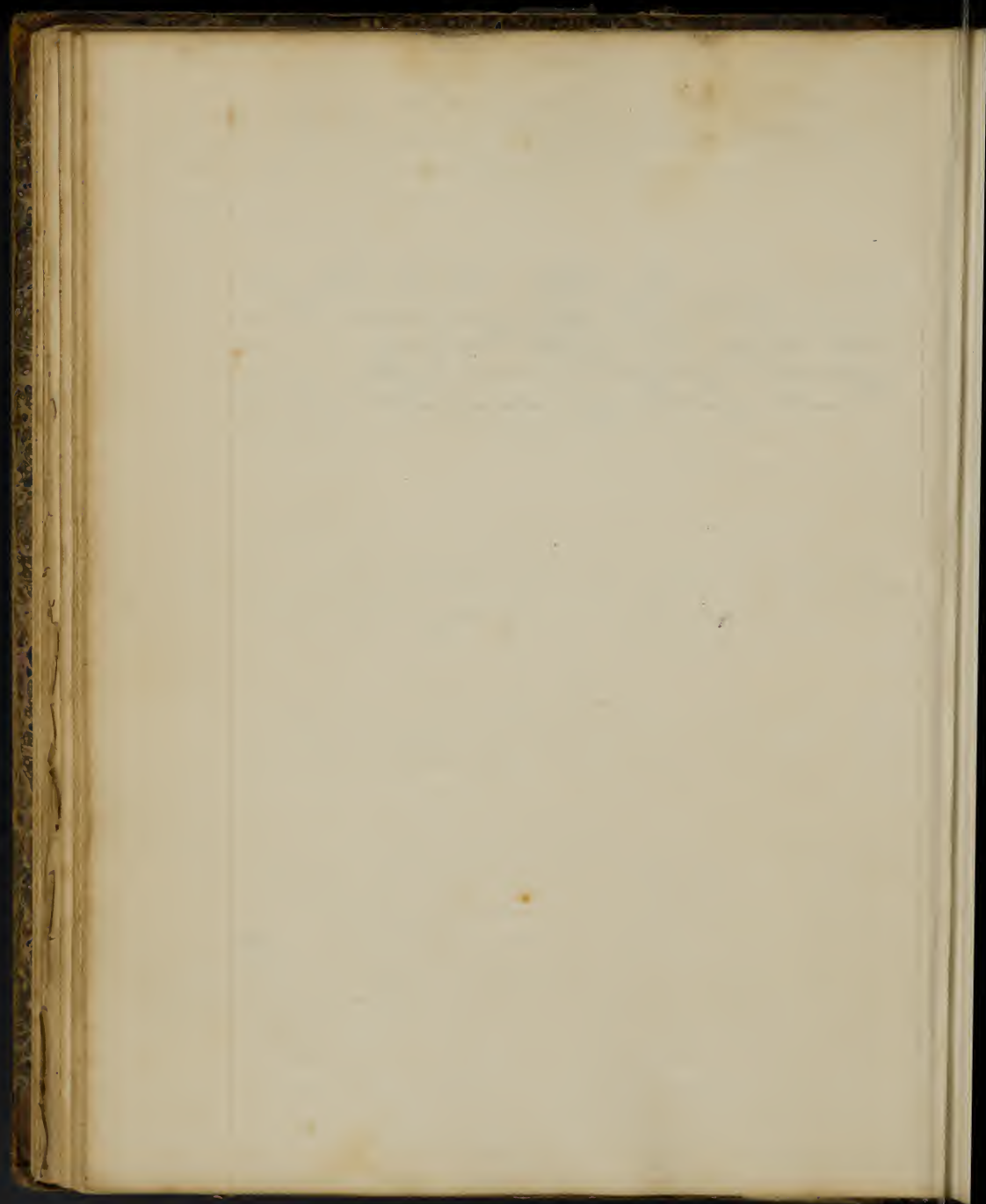
1. 604. 57.

415. 5

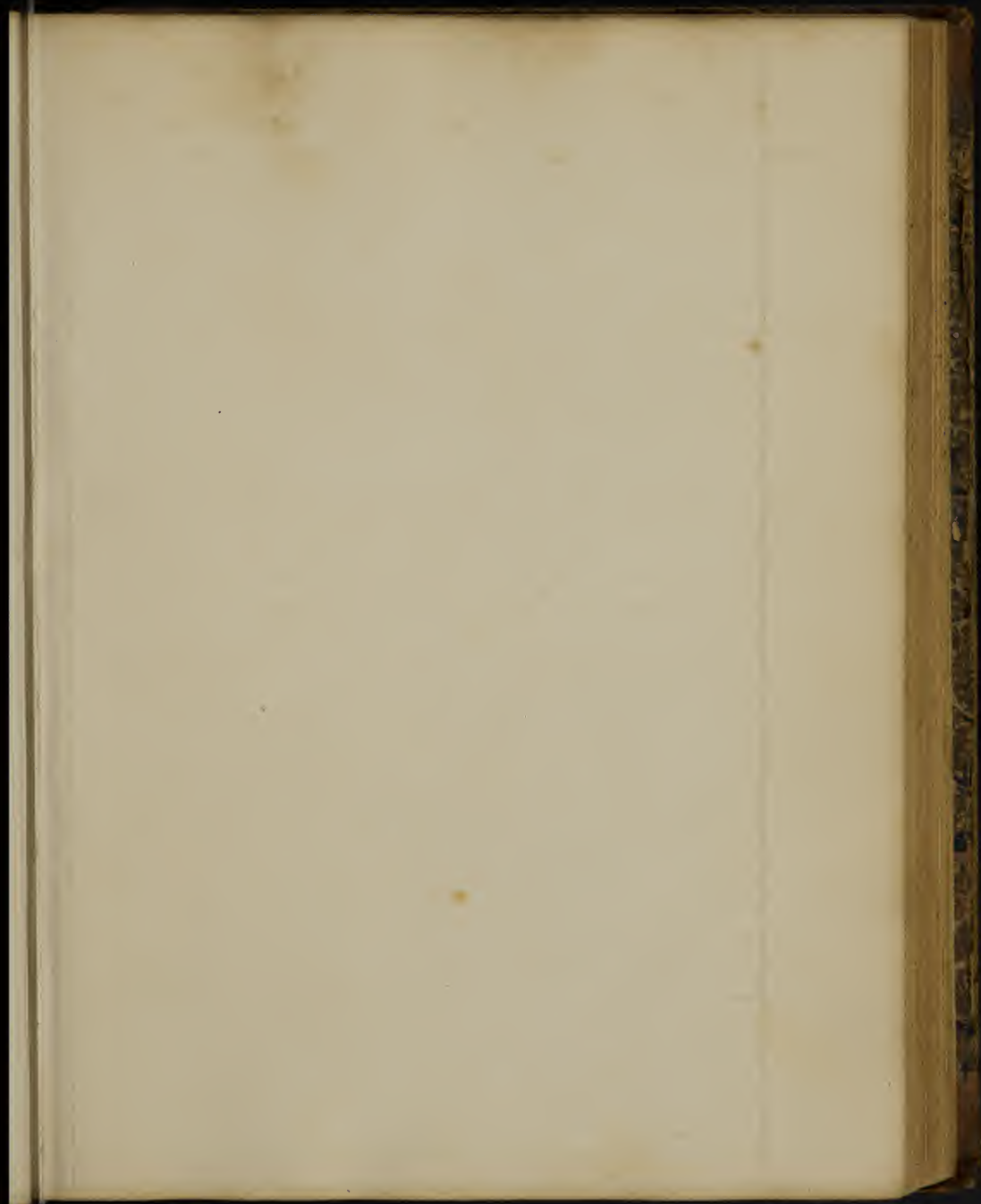
But the act of a third person can in general  
neither annul or qualify a contract. —

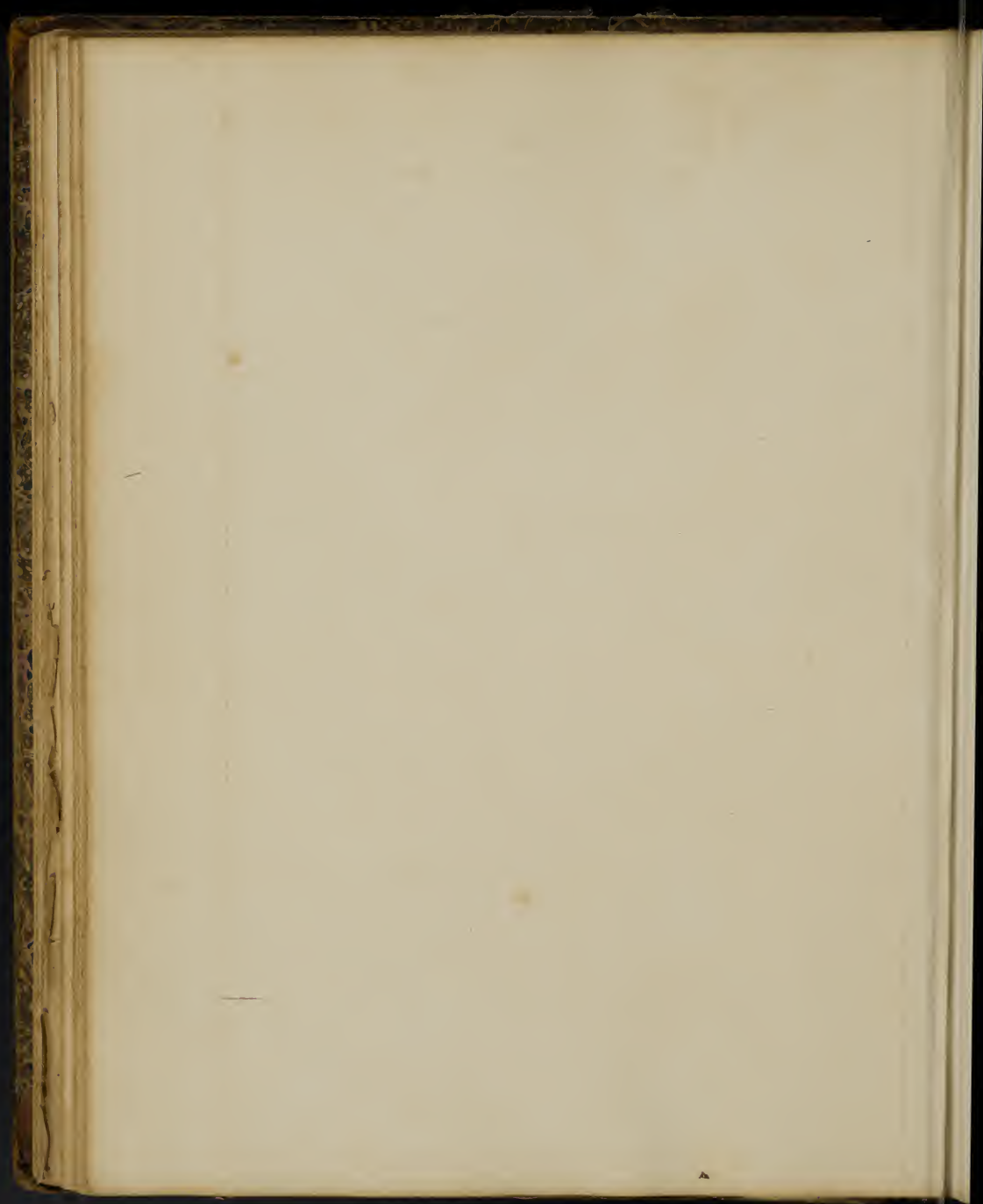
If by the terms of the contract the  
act of a third person is necessary to discharge  
the such third person may discharge &c —

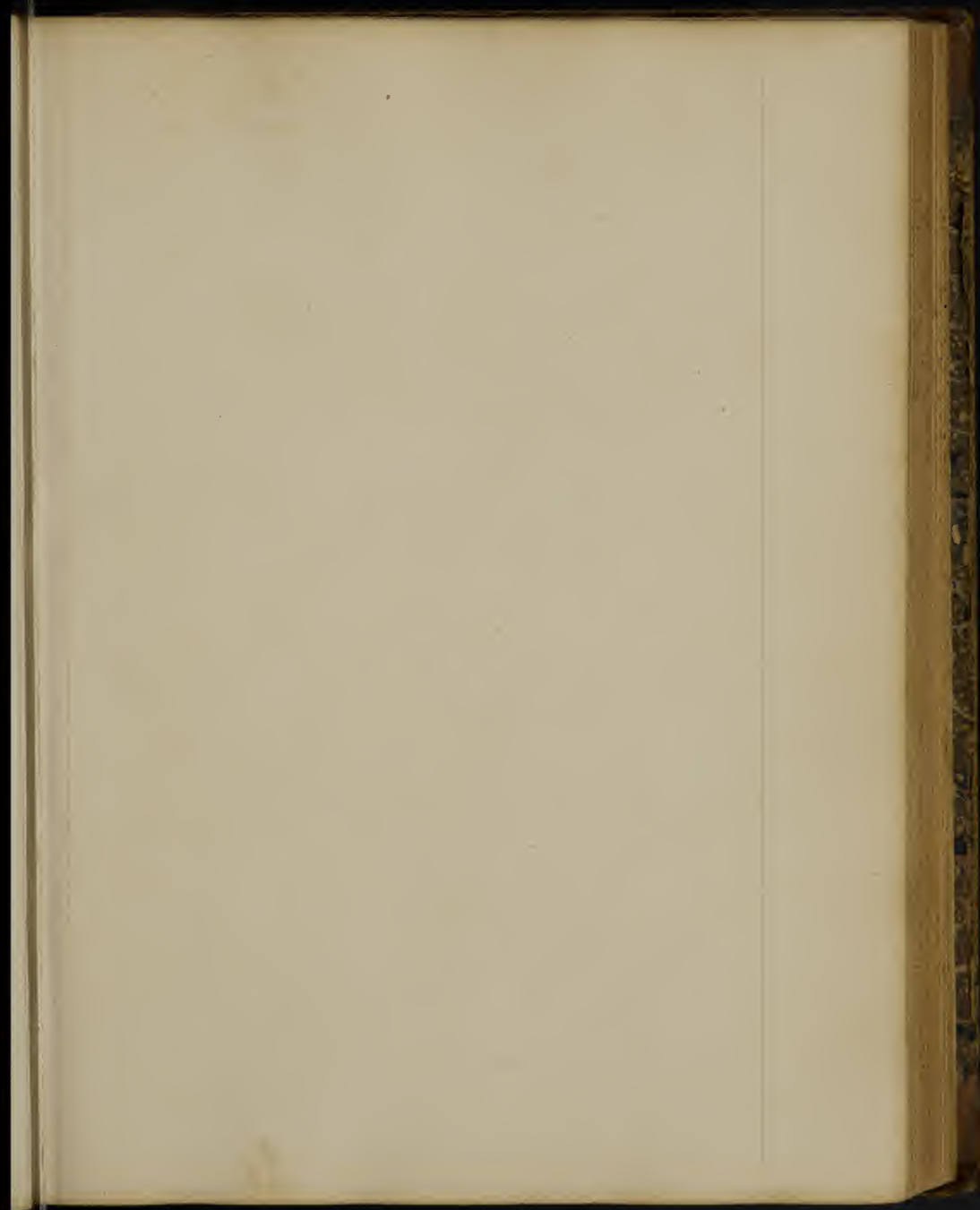


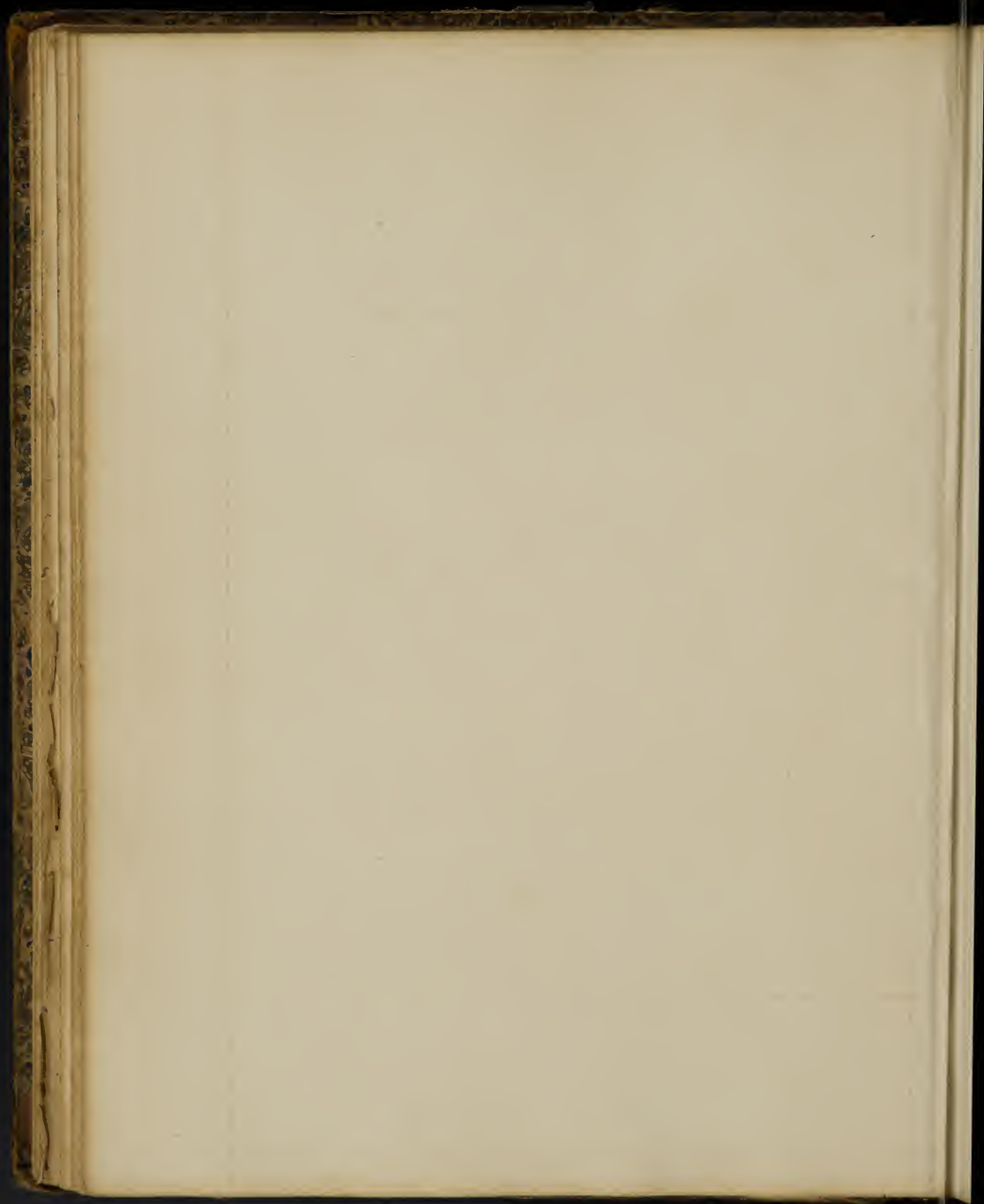




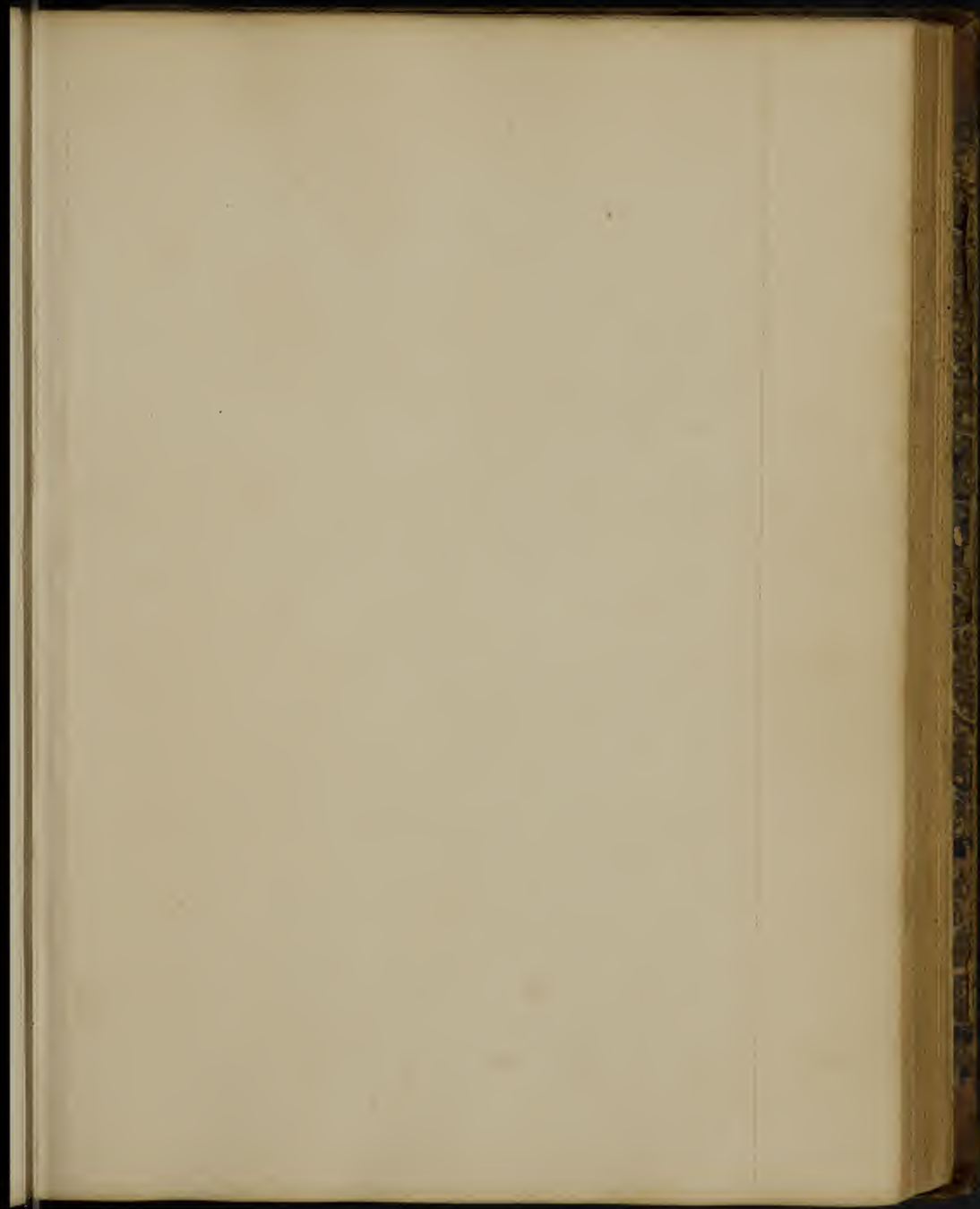


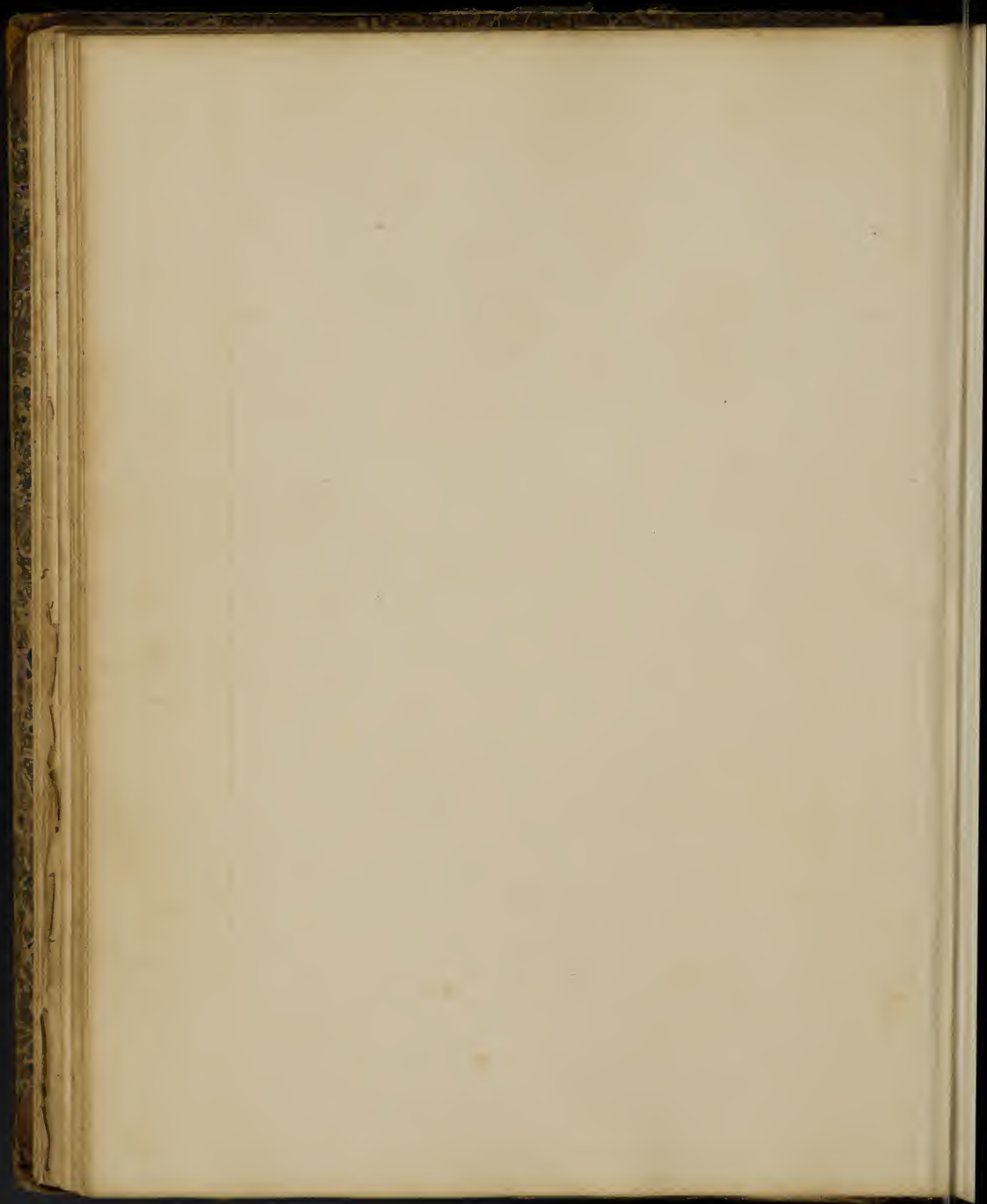


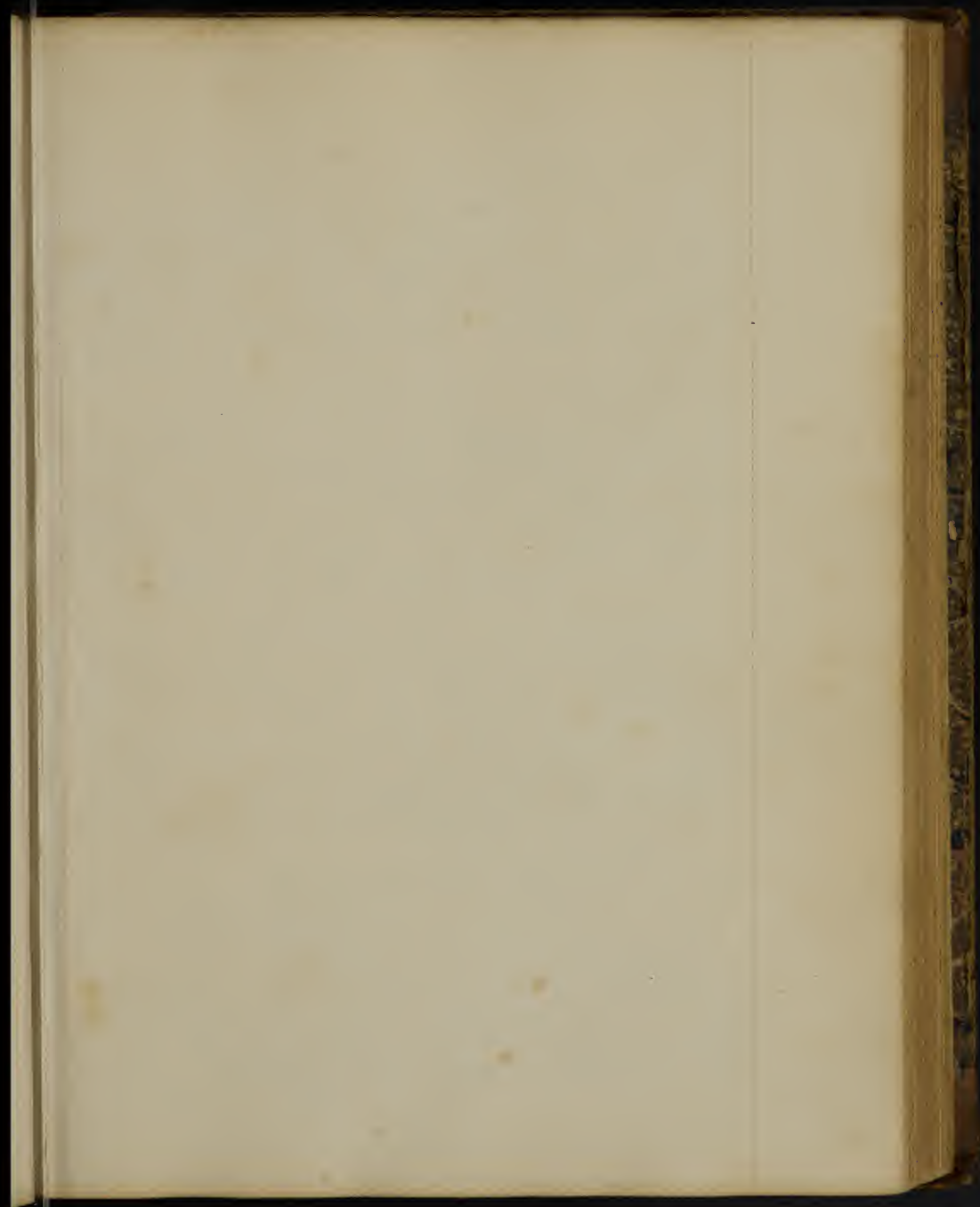


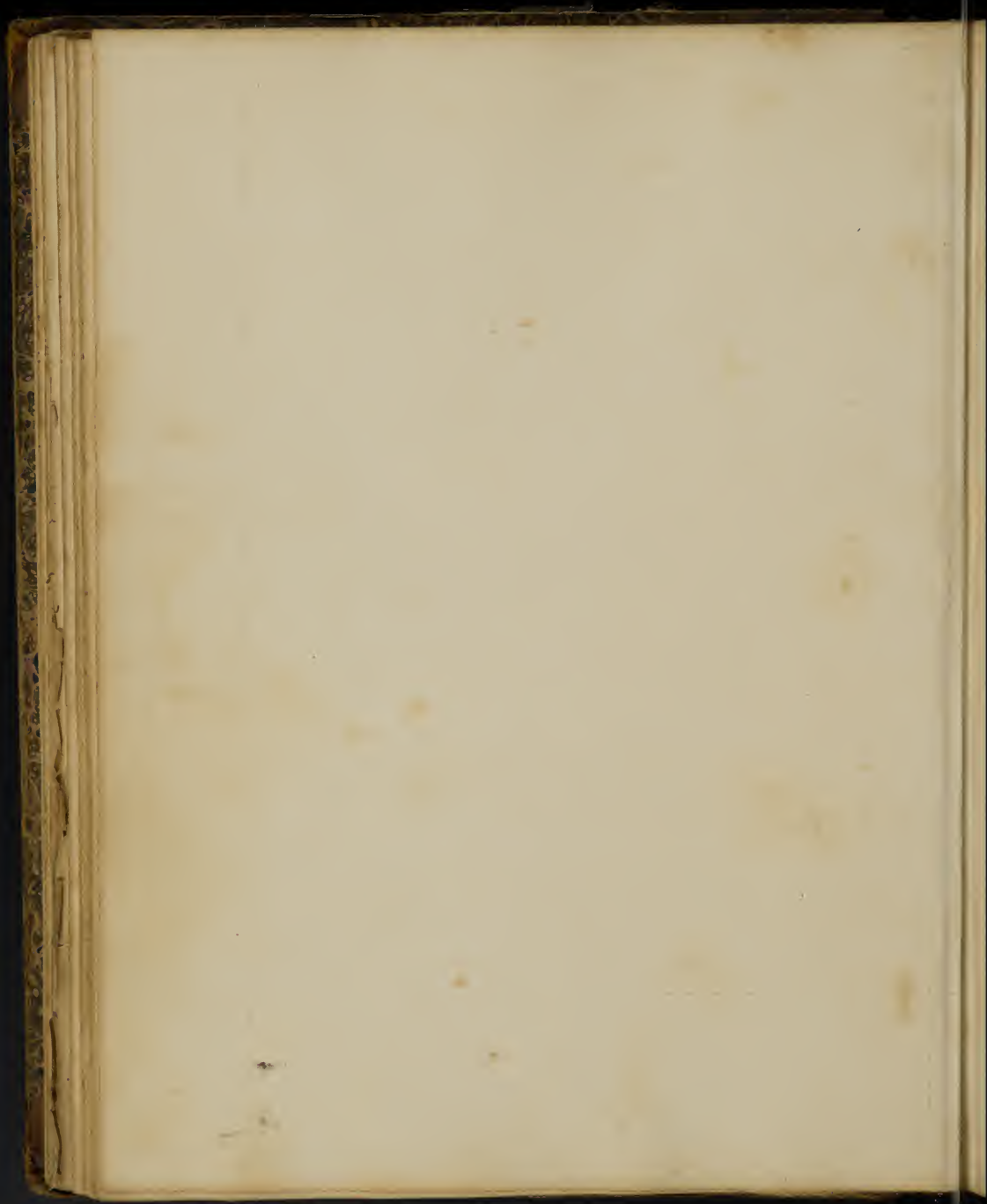














Sunday 27<sup>th</sup> October 1834.

### Real Property. No 1.

Things which are the subject of prop<sup>y</sup> are of two kinds viz real & personal. things real are permanent fixed & immovable. all other things are called personal 2 Blk Com 16. 384. 7. Co Litt 118. 2 Woodes 4.

Things real consist of lands tenements and hereditaments. land in the law includes all things of a permanent & <sup>material</sup> substantial nature. Tenement is of still greater extent & includes things incorporeal which may be held, of a permanent nature. such as lands rents franchises Co Litt 619. 20. 2 Blk 17.

Hereditament is still more extensive & includes whatever may be inherited whether real personal or mixed. for some things strictly personal are inheritable. thus heri looms a family picture. piece of plate which by custom is inheritable, so also a condition of w<sup>h</sup> the benefit may descend (3 Co 2. 2 Blk 17)

Now all these three things are merely the subjects of property

Hereditaments are incorporeal & corporeal the latter consists of substantial & permanent objects all w<sup>h</sup> may be included under the gen<sup>l</sup> term land for land includes water & buildings upon earth 2 Blk 17. 18. Co Litt 4.

Hence a conveyance of land passes all buildings & structures upon it unless they are expressly reserved. & all waters on the land as ponds & the beds of rivers not navigable 2 Blk 18.

But an action will not lie to recover a pool or water so nomine. the action must be for land covered by water — (16)

Land also in law has an indefinite extent upward & downward & Hence arises the action for overhanging the land of ~~land~~ <sup>any other</sup> (16)

A conveyance of land therefore passes all minerals & fossils under it. (16)

These particular subjects woods building water may be conveyed separately from the land. for tho' they belong to the land they are not inseparable from it. by a grant of water however nothing passes but the right of fishing in it. Co Litt 4:5:6. 2 Blk 18:19.

An incorporeal heredit: is a right issuing out of concerning, annexed to or exercisable within <sup>or upon</sup> something corporeal (16)

This thing corporeal may be personal prop<sup>y</sup> as jewels or real prop<sup>y</sup> as land — 2 Blk Com 19.

There is however a distinction between the incorp: heredit: itself & the profit produced by it. (2 Blk 20:1.) The profit may be corporeal tho' the right to this corporeal thing may be incorporeal. For the kinds of incorporeal heredit: vide Blk 21 & onward.

Many of these common law incorp: heredit: are unknown to us. Significs. tythes offices. corrodies — Alderson

But a right of common, a way, a rent  
annuities, pensions & franchises are incorporeal  
heredit<sup>s</sup> by our law. — Exist here,

Right of common — is a right which one  
person has, <sup>to a profit</sup> in & upon the land of another  
— the right to fish in ~~another's~~ pond &c. The owner  
of a right of common has no int<sup>er</sup> in a fee estate  
in the land 2 Blk 32.

As to the right of fishing on  
one's land the rule is in case of a navigable  
river or arm of the sea the right of the soil  
in the bed is in the state but the right of  
fishing is common. But in case of rivers  
not navigable the right of soil, & fishing is  
exclusively in the owner or owners of the bank  
of the river, within their own limits, 2 Burney 245. 1 M.C. 580.

Shunk v  
Skylly Nann  
Co. Rem. set  
March 1816.

4 Burn 2104, 509 425, Talk 357. 45 R 437.  
2 B & P 472, 1 Com. Rep 352. 510. 1 Mod 105. 650 73, 1 All 367.

All navigable rivers are called arms  
of the sea. But the right of soil in the navigable  
river as well as the exclusive right of fishing may  
be granted to an individual, here by the state  
in Eng<sup>l</sup> by the King. But no individual can  
have this ex: right except by a grant from  
the King or from the State.

5 Co 107. 2 P & P 472. 1 Com. Rep 352. 510.  
Dyer 326. b. Hargrave tract 12, Beale de jure maris  
207.

The same rule exactly holds in relation  
to the sea shore between high & low water mark 4 B & C 185  
2 B & P 472. 5 Co 107. Dyer 326. 4th Bur 2164.  
5 N. H. 2374  
Comy Dig. Nav. c. (vide Case Rich & Lockwood 1811. 5th Bay)



But the soil between high & low water mark may be granted but if it is granted alone the common right of fishery remains. Id

But both may be granted

The same rules which apply to arms of the sea as harbours &c apply to navigable rivers.

But in Penna -  
the principal  
river are consid-  
ered as navigable  
along this point

2 Penna 245, 495

Shunk v Schunk Kil Var Co March 1826

14 Serg & Raple 71

3 Kent 316, 2d ed

2 Conn 5 R554

Now a navigable river is one in which the tide ebbs & flows & from that point upward it ceases to be a navigable river. -

(Shunk v Schunk Kil Var Co March 1826) So in S. Carolina 1 McCord R580.

As to natural water courses every

proprietor adjoining has a right to the use of the water within his own bounds for culinary purposes & for watering his cattle & this right is absolute & exclusive

He has also a qualified right to use the water for artificial purposes but not so as to deprive the owner below of water suff<sup>t</sup> for culinary purposes & to water his cattle. nor to the prejudice of the other proprietors above or below unless he has some special claim so to do -

The proprietor above may divert the channel for irrigation. & if he return the stream to its original channel before it reaches the land of the owner below. & the diminution in the quantity <sup>by evaporation or absorption</sup> is regarded no injury to the proprietor below. if he leaves enough at extra

(1 Simon & Stuart 190) 6 East 208. 2 B & P 400. 1 Camp 463.

2 Com Rep 584. 1 Do 382. 4 Day 244.

1 Wilson 174. 10 Johnson 241. 15 Do 213.

8 Map 136. But he may not unreasonably detain the water or give it another direction, or throw it back upon the proprietor above - the water must be used in a reasonable manner & not so as materially to affair the app<sup>t</sup> of the water by the proprietor below -



These rules explain the original rights; but further One proprietor may by grant or by 20 years adverse use (in bon 15 yrs) + exclusive, acquire a special right to appropriate the + divert the whole water according to such grant or usage. The right may be enlarged or restrained by usage where the usage has, <sup>not been long enough to raise the presumption of a grant</sup>. An adjoining proprietor below may acquire a right of the proprietor above in the same way (viz) to throw the water back on the land of the proprietor above.

This rule respecting use is adopted by analogy from limitations. The same authorities for the statutes of limitations apply only to corporeal rights.

It was determined indeed in Comt that this use need not be adverse (2 Comt R 584) But I think that this use must be adverse, must be an infraction of the right of another, must commence in wrong the person agt whom the right is claimed must acquiesce in the violation of his rights - vide Trespass on the case & evidence. But according to the modern case, exclusive enjoyment for 20 yrs in a particular way becomes, adverse so as to raise the presumption of a grant.

The right acquired by use will correspond substantially with the user.

Will the presumption of grant exist where there is a personal disability to bring a suit to interrupt the enjoyment? 3 East 249 - 3 Bing 115 - 3 Kent C.

In certain cases, considerable effect is given to mere prior occupancy 15 John 213. 17 Maff 289. 27 C 2 R 11

## Estates

An estate in lands &c is the int whh the tenant has in them. & not the lands themselves 2 Blk 103. 6o Litt 345. 15 R 411.

Prima facie therefore, Estate means int but it is sometimes used to express the subject in whh one has an estate 1 Ves 228 2 R 559. 2 O. M. 336. 3 Wilson 414. 15 R 413-14

The quantity of int whh a tenant has is measured by its duration & hence the primary division of estates into such as are free hold & less than free hold 2 Blk 103. 4.

A free hold estate is one to whh livery of seizen is neccy by the common law & as to common incorporeal subjects there must be something equiv: to a liv: of seizen & neccy to constitute a free hold estate in them 2 Blk 104. Litt 559.

All estates to the conveyance of whh livery of seizen is neccy at com: law are estates of inheritance or estates for life or per autre vie.

Freeholds are therefore of inheritance or not of inheritance

The estates of inheritance are divided into inheritances absolute, & limited to particular (2 Blk 104. Litt 559.) Heirs

An absolute inheritance is what is usually called an estate in fee simple & this is an estate in lands &c whh one holds to himself & heirs forever (Litt 51. 2 Blk 104-106.)

The term fee has originally the same meaning as feud or fief & this is in its original sense taken in contradistinction from allodial. & meant an estate held of some superior in whom the ultimate prop<sup>y</sup> of the land resides & to whom it results in case of reheat & want of heir &c.

2 Blk 104. 5. 45:7.

An allodial estate is one whh a person holds in his own right & of no superior

In Const. the tenure of one who holds lands to himself & to his heir is declared allodial & yet by another statute the law of reheat is enforced.

Tuesday Nov. 30. 1824

A Fee is the highest estate wh<sup>ch</sup> a subject in England can hold. "He is seized thereof in his demesne as of fee" is the expression of the highest estate in England 2 Blk 105.

But Fee is now and not in its original sense but to denote the quantity of int<sup>ty</sup> 2 Blk 106.

The word fee now signifies an estate of inheritance & when used alone or with the adjunct 'simple' it is used in contradistinction to fee tail &c. 2 Blk 106.

A Fee in this sense may be held in any hereditament whatever corp<sup>or</sup> or incorp<sup>or</sup> but it must be a hereditament, in wh<sup>ch</sup> a fee simple can be held Litt 510. 2 Bl 20. 106:7

The fee simple or ultimate inheritance must in every case reside somewhere i.e. it can never be in abeyance. It is either in the present possessor or in him who has the ultimate p<sup>ro</sup>p<sup>erty</sup> (2 Blk 107. contra sed vide bottom of this page &c.)

Several inferior estates may indeed be carved out of a fee simple. thus if it makes a lease for years he still retains the ultimate fee simple (Bl)

But if a grant is made to A for life with remainder to the heirs of B & B being alive the remainder according the Bl is in abeyance for B has while alive no heirs. See 2 Bl 107. But this is not law for what does not pass from the grantor remains in him therefore the fee simple remains in the grantor in this case until B has heirs & when B has heirs they have the fee simple. Page 275: 85. 6. 267. 513. Can 262



So if a grant is made to a sole corporation  
as to person & his successors according to Litt &  
Bl the fee simple is in abeyance for it does not  
rest in the person. Litt 564b. 2 Bl 107

But this is incorrect for whatever does  
not rest in the person resides in the grantee &  
his heirs ready to rest in each incumbent  
when appointed. 2 Bl 107 (u)

And the second incumbent when  
intituled is entitled to all the profits from  
the death of the first incumbent wh could  
not be if in abeyance - 2 Bl 107

To pass a fee in inheritance of  
any kind <sup>in deed</sup> the word "heirs" must be used  
tho when <sup>in estate</sup> it is granted to a corporation sole  
the word "successors" answers the same purpose  
And where a grant is made to a corporation aggregate a fee passes with the word  
<sup>heirs or successors</sup> Therefore land granted to A forever &  
to A & his assigns forever gives it only an  
estate for life. The word "heirs" without any  
words of perpetuity is sufficient to pass an  
estate of inheritance. Litt 51. 2 Bl 56. 107  
For the word "heirs" is used to denote the quantity  
of interest - it is a word of limitation.

It is not indispensable in a devis  
to create a fee simple that the word "heirs"  
be used. it is necessary only in (common law)  
conveyances. <sup>intestates</sup> In devises a more liberal rule  
is allowed for the man making the will  
is supposed to be in extremis. Therefore  
land devised with these words 'in fee simple'  
passes a fee simple

now 659. 2 Bl 108

Wills by which a devise of lands to 'a forever' or to  
a fee may be devised & his assigns forever carries a fee simple  
conveyed by Devise, Doug 322. 1 Blk R 672. 4 Burr 2579  
Ferne 113. 2 Bl 381.

5 B & Adolph 122. But a devise <sup>of land</sup> to a & his assigns without  
a term of perpetuity passes only an estate  
for life. (Ex. I devise all my lands to A,  
If one devises thus I give to A  
all my estate when he has a fee simple  
a fee simple will pass. Cow 659. 18 R 412  
2 Do 657. 4th Do 73. 5 Do 562. 6 Do 34.  
67. 502. 1 H Bl 223. Doug 734. for the word  
'estate' signifies interest.

Some however have taken a  
distinction between a devise "of all my  
estate" & "of all my estate in such a  
place" holds that in the latter case, only an  
estate for life passes by the devise

Cow 306. But whether the form be one  
or the other the estate passes in fee simple  
for no estate except one of fee simple  
can be devised.

15 R 411. 2 Atk 37. 1 Ves 228  
2 do 614. 2 P W 4 524. Cow 355.

And it is not material what  
words are used in a devise where the intention  
to pass a fee simple is manifest.

Therefore a devise "I give all my  
effects personal & Real" passes a fee simple of  
the real part.

Cow 299. 1 East 33. 3 Do 576. 2 New R 343

"I devise to a all I am worth" is  
a devise which passes a fee simple of land 1 Br 6743  
8 R 16. arg.

It has been contended by some that the word hereditament ex vi terminum carries a (Do.) fee in a devise. but this rule is now different therefore a devise of all hereditaments passes no fee simple but merely an estate for life

5 T.R. 558. 3 Do 356. 6 Do 175. 8 Do 497  
Salk 239. 1 B & P 558—

The words 'all my property' passes a fee simple if the testator has it. The word property (2 New R 221:2) denotes an interest like the word estate—

And even the word 'legacy' has been held to pass realty & even a fee simple where from its connection the intention is apparent to pass a fee simple Doug 39. 1 Burr 268  
1 P.M.M. 182. 5 T.R. 716. 1 East 37a.

A devise thus "I give all my lands to A.B. he paying any gross sum towards debts &c" will carry a fee if the testator has a fee

6 Do 16 2 New R 343. 1 B & P 30. 3 Burr 1623  
3 T.R. 358. Poul on Devises 502 stating

The reason of this rule is that the devisee is always supposed to be an object of the testator's bounty. but to take an estate for life in this case would be no advantage therefore he takes an estate in fee for by taking the estate he becomes personally liable for the debts &c

On the contrary a devise of land to A he paying a certain sum out of the profits of the land passes only an estate for life. for he is bound only to pay the amt of the profits therefore by taking an estate for life he cannot be a loser 6 Co 16. Cow 239  
2 New R 343. 3 T.R. 358. 5 East 67. 3 Burr 1618:23.  
vide title Devises.



Words by will  
a fee paper

If a man devise then "I give my land to  
A" he paying such an annuity. The effect is  
that if the annuity is up than the annual  
value of the land the devise carries an estate  
for life but if more is taken an estate in  
fee simple — If the words were he paying  
"thereout" the annuity the rule would be diff.  
translation in fee does not pass, 2 Co 1b. 5 TR 13 3 Br 1533.  
111. 1123. 222 261

A devise of the rents & profits of  
land has the same effect as a devise of the  
land itself. 2 Lick 225. 1 Eq. ca. 352  
Add Ray 877. 1 Br 6475. 7 East 97. 1 Newb 116.  
2 Co 220. Indeed all the right whp a subject  
in Engl<sup>d</sup> can have is a right to the rents & profits,

The circumstance that a will is  
attested by 3 witnesses is not suff<sup>t</sup> to carry a  
fee simple. 1 Newb 116. 2 Lick 220. 7 East 97.  
Indeed nothing is more common than to find wills of man  
personal prop<sup>y</sup> so attested — It has been contended that  
5 TR 13; 14. Surprising introductory words in a devise will  
563. 5th 564 carry a fee to a devise where otherwise only  
1 Br 356 311 a life estate is? pass. but this opinion is  
1 Br 343: 4 exploded but such words will turn the balance where  
3 Br 1025. there is a balance — <sup>with things</sup> The word 'heir' is not necessary to  
Comp 299. 366. 666 pass a fee simple by a fine or common recovery  
for here a fee simple passes by act & operation  
of law (2 Blk 105. 354. 357. In form at least  
these are not common assurances.

So in grants of land to a sole  
corporation <sup>the word heir</sup> is neither necessary or proper the  
word successors should be used. for if a person  
intending to convey land to a sole corp.  
grants land to a person for instance & his "heir"  
the heir of the individual person will take  
the land & not his successors. 2 Blk 108.



But in a grant to a corporation aggregate neither the words "heirs or successors" are necessary to pass a fee simple. for an aggregate corp. never dies (2 BL 109. 1 Do 484.) & therefore tho' the corporation takes only a life estate it takes virtually a fee.  
So a grant of land to the King without words of inheritance passes a fee simple (2 BL 249. 109.) For in law the King never dies.

Suppose then an individual grants his land to a sovereign state. the state will hold the land in fee simple. for a state of this kind is a body aggregate & never dies. indeed it w<sup>d</sup> be absurd to say 'to Count & its heirs' or to Count & its successors. there can be no words of limitation.

The word "heirs" is regularly & always prima facie a word of limitation that is a word expressive of the quantity of int<sup>ty</sup> given but it sometimes is descriptive or rather word of purchase whh describe the person who is to take after the first donee. If therefore land is granted to A & his heirs this decides not who shall take on A's death but what quantity of int<sup>ty</sup> A shall take & the law decides who shall take on A's death.

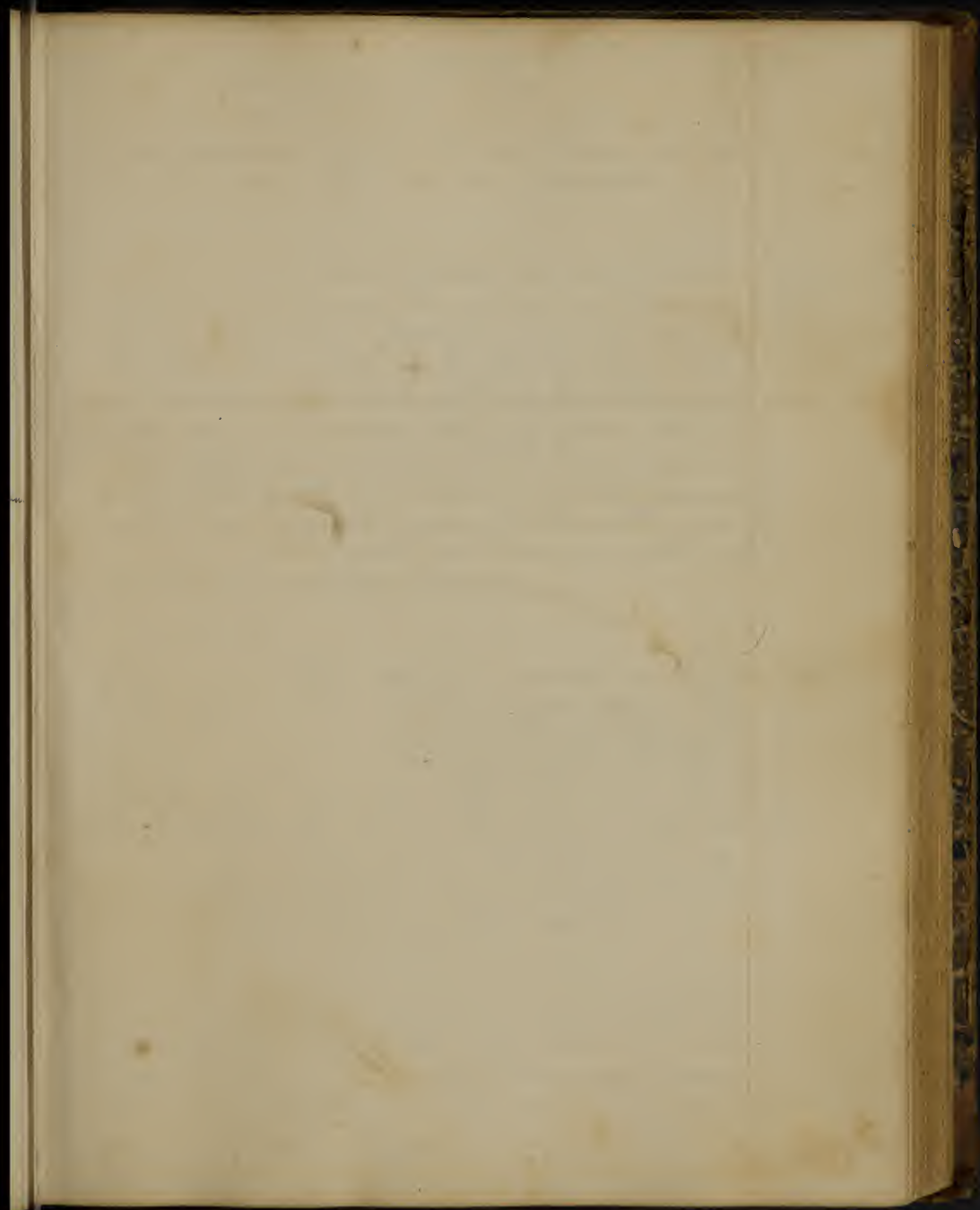
If an estate is granted to A for life remainder to his heirs A has a fee simple — Again an estate to A for life remainder to B for life remainder to A's heirs for life here A has a fee simple subject to B's intermediate <sup>estate</sup> life estate.  
18 Co 93. 104. 5. Shelley's case, 3 Co 21-31. 42-6  
74- 82. 101. 107. 112. 125. 294. 11 Co 794  
772 553. 5 Do 320. 4 Do 82. 294. 1 Burr 38. 2 BL 172 note

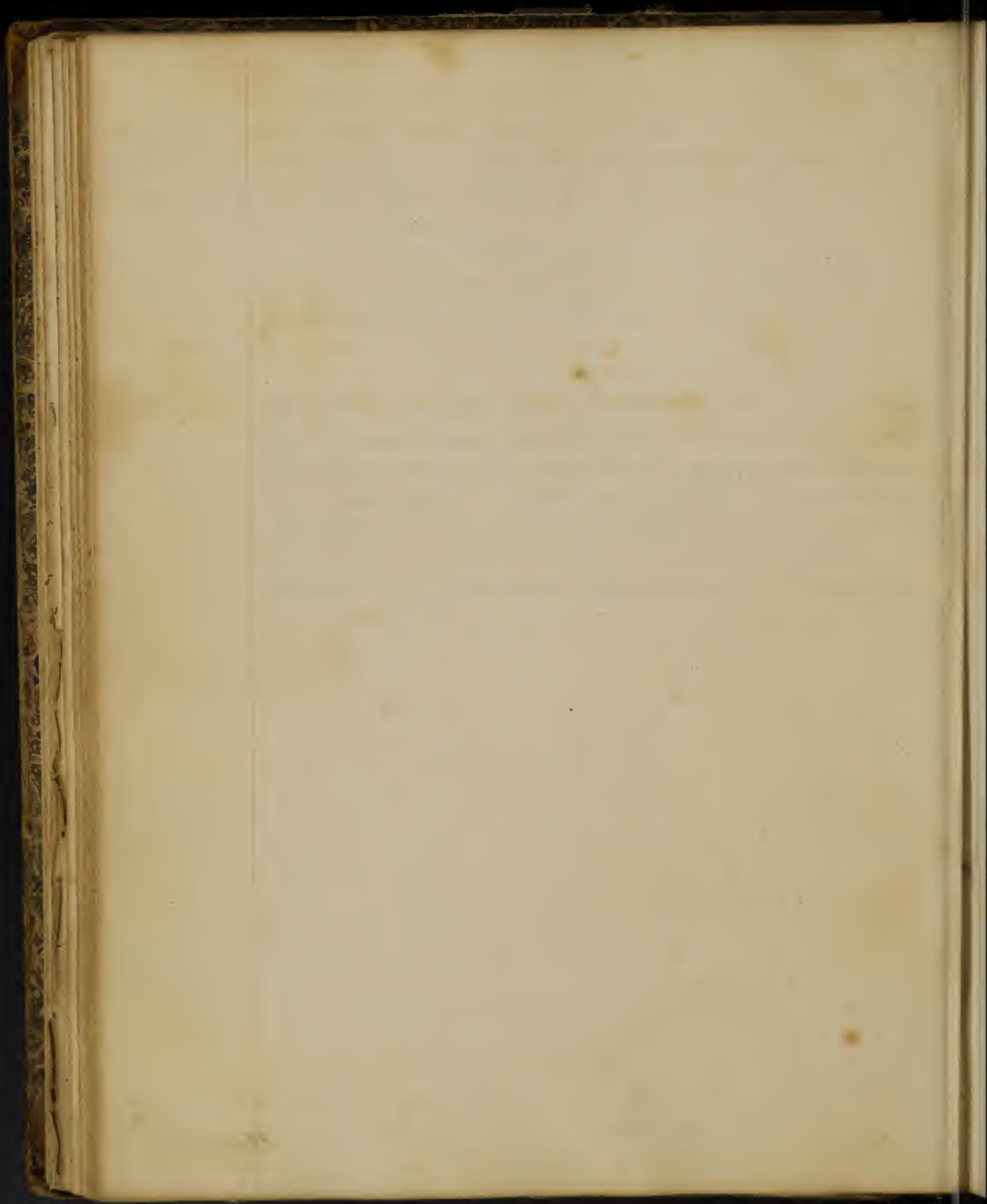
\*this rule is abrogated  
in Comm. vide at  
tit 56. cl. 55. p. 301

1 Bay 299. And this rule holds whether the conveyance  
10 Conn. R 448 is by devise or by grant. & the heirs in  
Goodrich v. Lambert, each of these cases take by descent & not  
by purchase —

This rule originated in reasons merely  
technical, — for the sake of securing the claiming  
of the land where a descent takes place,

That the word heirs is essential to the passing of an estate  
in fee by deed, yet in every contract a more liberal rule  
prevails & in case of a deed a Ct. of Equity will supply  
way of correcting a mistake & supply words of inheritance  
where the intention of the parties was to pass a fee  
& Kent C.J., and this even agt. an attaching creditor  
with notice 10 Conn. R 243 Chamberlain v. Thompson







Wednesday Dec<sup>r</sup> 1<sup>st</sup> 1824

Real property. N<sup>o</sup> 2.

So also the words 'heir of his body' is a term of imitation & describe the quantity of int<sup>r</sup> taken by the donee. (It) viz an estate tail.

A direct ~~grant~~ <sup>devise</sup> to the heir of A conveys no estate at all unless A dies before the testator. 2 Vent 313. Ray 332 Cow 313:14. For until A's death his heir or heirs are uncertain. But on A's death his heirs take by way of ex<sup>o</sup> devise (vide post ex<sup>o</sup> devise) The words 'heir' (if from other words in the devise) if it appears to be used as a word of description; ~~the~~ will pass an estate by purchase to the heirs apparent during the life of the ancestor. Every mode of acquiring estate except by descent is called purchase.

If a devise is made to the heir Per 4376:7 of A, taking notice that A is now alive this devise will carry an estate to the heirs apparent. Farnie 143. Ray 330 1 J. M. 29. 2 Bl R 1010. 2 Bur 1100 1 Boullie 421. 2 Lev 232 & the heirs will take on the death of the deviser tho the ancestor still lives.

And where a limitation is to "heir" & it is construed as a word of purchase the estate is taken in fee simple.

2 Ven 313

Suppose a devise to A for life remainder to the heir of B. heir heir is a word of purchase. & see 10 Co 93. 104.5. Farnie 21-31. &c.) & yet the heirs of B take a fee.

But the word "heir" is always taken as a word of limitation in a deed —

If a fee is granted on a condition w<sup>th</sup> any of its incidents, <sup>on a condition</sup> ~~the condition~~ is void, as a condition that the tenant in fee simple shall not alien — shall not commit waste, shall not (2 R 61. & Litt 13. Dors 329) take the profits, that wife shall not have dower &c 4 Kent C 131:2

### Limited fees.

There are such estates of inheritance as are attended with conditions or qualifications.

Of 2 sorts.

1 Qualified or base fees

2 limited or conditional at common law, These last have by the English Stat de donis become estates tail. 2 Blk 109  
ie in genl, some fees cond<sup>d</sup> at all yet remain perfect

A base fee is one w<sup>ch</sup> has a qualification annexed & must determine when that qualification fails,

This kind of estate is now out of use.

Co Litt 27. 2 Blk 109. Kent defines it "an int<sup>y</sup> which may continue forever but liable to be determined by some event circumscribing its extent" — A fee con<sup>d</sup> at common law is a fee

restrained to some particular heir of the donor

2 Bl 109. & not to the heirs genl

of fee then, conditioned <sup>or called a fee con<sup>d</sup></sup> by reasons <sup>expressed or implied</sup> of the condition, that if the donee dies without such heirs the estate returns to the donor (or called a fee con<sup>d</sup>)

St. Pardon 241

But under such a condition if the donee had any issue the estate was at common Estates law deemed absolute by the fulfilment tail, of the condition. but this was a plain perversion of the intention of the donor.

At least it was absolute for these purposes

II. To enable the donee to alienate it

III. To subject the estate to forfeiture

III. To enable him to encumber it

so as to bind it in the hands of issue

2 Bl III. Co Litt 319.

If however the donee did not alienate during the life of the issue if the issue died before himself the land on his death reverted to the donor. & if he left issue the estate became absolute in them.

2 Bl 110-11. On his death the estate must have reverted, for it was limited only to the heirs of his body,

In consequence of this construction the 1st of West II. 13 Ed 1. De donis - enacting that the will of the donor should be followed - that the tenements should at all events go to the issue if any if none go to the donor.

2 Bl 112.

In the construction of this, at the widow divided the estate into two parts viz a species of particular estate called an estate tail rested in the donee & the ultimate fee simple, in the donor exceptant on the termination of the fee tail, as a reversion.

This it then converted fee simple into fee tail. 2 Bl 112.



Now there was no reversion to a fee  
216 170 conditional at the common law, but to  
1 Br 320. a fee (tail 513.) tail there is always a reversion  
2 Bl 113 (N). The st de donis is prima facie  
the law of this country -

But fees conditional are  
not in every case converted into fees tail  
for they extend only to tenements &  
this includes corporeal hereditaments & incorporeal  
rights which survive of the realty as rents,  
rights of common &c. 7 Co 33. 2 Bl 113.

But there are certain reversionary interests which  
are incorporeal & do not survive of the  
realty & to these the st de donis does not extend  
as annuities & offices these therefore are  
left as at common law.

An Annuity does not come within  
the word tenement & therefore if lim-  
ited to 2 & the hrs of his body 2 takes  
a fee conditional at common law  
2 Bl 41. 113. Co Litt 144. 19:20.

The reason why an annuity is  
not a tenement is because it charges  
only the person of the grantor.

It follows that if an annuity is  
granted to 2, & to the hrs of his body, when  
2 has heirs he may alien the annuity & this  
interest (1 Br 64385. 2 Wms 170) admits of no  
remainder for or issue born 2 has a fee to most  
purposes. A usufruct cannot be entailed  
nor be the subject of a fee conditional at  
common law because such an interest does not  
admit of a limitation by way of inheritance.



If therefore a personal chattel is granted to A & his heirs or heirs of his body <sup>to</sup> vest in him Estates absolutely. a fee of any kind cannot exist in tail.  
a chattel 1 Br 64 274. 2 Bl 398. 113. bk note  
174. Poul. in Decies 243. 3 P Wms 259. Fearn  
304:5. 342.

The reason is that personal chattels being movable, transient & perishable they are not fit subject of inheritable interest.

And even at com. law. a life estate <sup>being by way of gift or devise</sup> is all a person can have in them, & he who has a life estate has the whole interest in them.

An estate tail may in a devise be created by mere implication. as if one devises land to A & if he dies without heirs of his body to B. A takes an estate tail by implication —

Or if one estate to A & if he dies without issue so the same rule holds; B is not to take if A has issue the intention then is clear that A shall take an estate tail, but in a deed not so 3 TR 83  
9 Co 127b. 1 P Wms 605. 3 Aik 398, Cow 234. Carth 343.  
2 Aik 305. 310:14. 2 Bl 6281. — for in a deed the words 'heirs of his body &c' are indispensable.

Further if land is devised to A & his heirs forever & if he dies without heirs of his body to B. A takes an estate tail 70.2 376.  
Fearn 170. 301:2. The latter words qualify the generality of the former — But in a deed A would take a fee simple for in a deed the first words govern. in a devise the last words govern.  
see other examples Cow 234. 5 TR 336.7  
5 de 5:211 3 Co 145:6. Fearn 170:300.

Ex. John A. devises land to A & to his  
estates tail, the land shall go to <sup>B</sup> his heirs if B is  
Amcreated? collateral heir to A. it takes a fee  
tail (A) by implication, if B is not a  
collateral kin to A the rule is otherwise—

Several species of estates tail  
gen'l or special.

male or female.

Fee tail gen'l Fee tail special  
Tail male gen'l Tail female gen'l &c  
Litt 514-16. 26-29. 2 Blk 113, 114

Where an estate is limited to male  
the descent must be traced exclusively by  
his male & so of female, m. m., Litt 524.  
Co Litt 25. 2 Blk 114.—

To create an estate tail by deed  
not only the word heirs but the word  
body or some other word of procreation,  
is necy to limit the estate to the particular  
heirs. 2 Bl 114:5. 2 Bl 331. Co Litt 20.

And if either of these two terms  
is omitted in a deed an estate tail will  
pass. An estate therefore to A & his issue  
to A & his children or to A & his issue  
is only an estate for life in A. (Bl)

A grant to 'A & his heirs male' or  
'to A & his heirs female' passes a fee simple  
descentible to his heirs male or female. —  
indifferently.

The reason is that there are no words of  
procreation & also it is impossible to limit estate tail  
an estate to male heirs gen'l or female heirs how created?  
gen'l. for no such estate is known to the  
law. 5 R 31. Co Litt 27. a. 5 R 338.

The reason why a takes an estate  
in fee is that where a grantor expresses himself  
ambiguously the construction is made most strongly  
of the grantor Co Litt 36. 2 Bl 131. 5 R 338.

But the same words in a devise create  
an estate tail for in a devise the intention  
must govern. (5 R 338. 2 Bl 115. 381. Doug 322)  
And this intention may be inferred from any words,

And by devise an estate tail may  
be created without the word heirs, as where  
one devises "to a & to his posterity." 1 H Blk 447  
2 Bl 115. 381. the term 'posterity' signifies in  
common language 'heirs of the body'  
such an expression in a deed  
would give a an estate for life only.

So in a devise if land is given  
to a & his children or issue a having no  
children or issue. a takes in estate tail.  
descendible to his lineal heirs.

6 Co 17 a 1 H Bl 456:60 Doug 306  
10 J: 10. 1 Ven 227. 331. 4 R 294. 2 Bl 115. note

For the intention is, that his children shall  
take & they cannot take with a for they are  
not in issue, neither can it be the intention  
that they shall take by way of remainders, they  
must therefore take as issue in tail.



Estate tail On the other hand if land is given to  
How created? A & his children in a series he having  
children at the time he & his children  
they in being take a joint estate for  
life after born children take nothing  
6 Co 16 b. Bro Eliz 743. 1 East 262. Cow 314  
1 New 114 -

If one gives land to A & after his death  
to his children. whether he has 2 or has not children  
he takes an estate for life & after him they  
take an estate for life. A's children subsequently  
born take with the others in this case, 6 Co 16 b  
Co Litt 9 a. 2 Vernon 545. Dow 306. Comp 300:14  
3 Co 17 a. 2 New R 343. Doug 415:17.

The word there is a st in the  
making the rule in Shelley's case (see ante)

If an estate is limited to A & to  
the he female of his body the female issue of  
A will take in estate tail tho' by A's having  
a son they are not his. Co Litt 24 b. 27 a  
4 Cruise Dig 35.

It was formerly held that if an  
estate was limited to A, <sup>heir female</sup> ~~daughter~~ as purchaser  
if A had a son they should not take but this  
is not now law. Co Litt 24 b. 27 b note a  
Totart 27.

See Co Litt 164 a note 2  
5 Burr 2615. 1 Donbl 422. 3 Salk 336. 2 P Wms  
Frazer 32. 147. Free in li 54. The reason for the  
old rule was that the daughters did not  
answer both parts of the description viz of  
being heir as well as being female - but this  
rule was technical & always disappointed the  
intention of the donor.



- The incidents to a tenancy in tail are Incidents  
1<sup>st</sup> The tenant in tail is not liable for waste estate tail,  
2<sup>nd</sup> The wife of such tenant is entitled to dower  
3<sup>rd</sup> The husband of such tenant is entitled to curtesy  
4<sup>th</sup> The estate may be barred, i.e. the tenant  
locked a converted into a fee simple by fine &  
common recovery.

2 BL 1151. 60 Etc 204. 2 BL 348-64.

2 BL 303. — As to wife dower & she cannot  
have it unless the estate is so limited that her issue might  
inherit, — estate tail was first barred by com.  
recovery — (32 Hen 8. the legalized these com. recoveries)  
Fines & recoveries are merely modes of  
executing the will of the donor. 2 BL 116-15.

The tenant's right to levy a fine &  
suffer a recovery is an incident inseparable from  
an estate tail & a condition restraining this  
right would be void in law 4 TR 603. 4  
8 Geo 61.

By the law of this state entails are  
looked in favour of the <sup>immediate</sup> issue of the  
donor. 4 C 43.

"Every estate given in fee tail shall be &  
remain an absolute estate in fee simple to  
the issue of the first donee in tail," Stat of  
Conn. tit Landg. c. 1. § 4. p 301.

Estate of freehold not of inheritance  
estate for life.

are the lowest kinds of freehold. & the smallest of all real estates 2 Blk 120. It has been doubted whether an estate for life in land is real estate, but I think it must be real estate as much as an inheritance:

Estate for life are either conventional is created by contract, or legal is created by operation of law (It).

Conventional estates are always created by some species of common appearance & may be for the life of the tenant or for the life of some other person or for the lives of many number of persons & then it continues until the death of the last survivor among them.

A legal estate <sup>for life</sup> is only for the life of the tenant. (It)

An estate for a life of another is called an estate per autre vie.

If such an estate is limited to A & his heirs & A dies before cestuy que vie the heir of A takes the estate by special occupancy Litt 556. 2 Bl 120 He cannot take it as heir for the estate is not of inheritance

But if it is not thus limited to the heir of the tenant the estate if A dies before cestuy que vie the estate at common law is hereditas perennis. but by 2629 bar 2 & 14 Geo 3. direct that in this case that it may on his death devise his estate as his heir 2 Blk 258. 261. Co Litt 41. Litt 556.

These statutes direct that in case no devise is made the estate shall go to the heir of his name if not to Ex'r &c





The incidents to all life estates

II. The tenant, if not restrained by express covenant, take of common right all reasonable estovers, i.e. all necessary wood & timber for the use of the farm, as wood for fuel, for repairs of houses & instruments of husbandry. &c. &c.  
2 Bl. 35. 122. Co Litt 41. 53.

But a tenant for life is not allowed to fell timber for other purposes. (Co Litt 53 & Blk 122) as for erecting new buildings &c. (post.)

III. Such a tenant is not to be injured by a sudden determination of the estate unless it is by his own act. His reprent are entitled to the emblemments

Emblemments, are the profits & crops produced by annual labour.

but grass is not an emblemment as post.  
2 Bl 122/3. Co Litt 255 (5 Binn & ad 105. 2) & LA 52)

On the same principle if the estoyage per se the tenant is entitled to the emblemments. (21) for here the estate terminates by the act of God, not by his own act.

The rule is the same when the estate ends by operation of law 5 Co 116 & Bl 123. Ex. leave to Hus. & wife during coverture & they are directed in vinculo to the Hus. is entitled to the emblemments not the wife for the labour bestowed on the crops is presumed to be husb's labour,



But when such sudden termination of the estate happens by the act of the tenant Incidentally He is not entitled to emblements - It is his Estate for life own folly (2 Bl 123. Co. Ill 55) to determine the estate,

3. The under tenant or lessee of a tenant for life is entitled to all these rights & in some cases even greater rights than those possessed by the tenant for life himself

Thus if the estate of the tenant for life is terminated by the act of the tenant the lessee is entitled to emblements. tho' the orig'l lessee in this case w<sup>d</sup> not have them,  
Bro Eli, 461. 1 Roll 727 2 Bl 124

By the common law, on the death of the tenant, the under tenant may leave the land & avoid the payt of all rent accrued during the term since last payt day, for at comm. law rent cannot be apportioned, But by St 11 Geo 2. the tenant in such case must pay rent pro rata  
2 Bl 124. 10 Co 127.

If tenant for life under lts for years & 2 Bl 325 dies, the estate for years expires unless the lts 5516 remainder man has previously confirmed 2 Bl 105 the estate -

Co. p 412  
15 R 56

an estate for life may be forfeited  
by attempting to convey an estate greater  
than his own — by waste — by felony  
+ treason 2 Bl 125. Co Litt 27.

All conveyances of estates by act of  
the parties are called common assurances

### Legal life estates of 3 kinds

Tenantcy in tail after possibility of issue extinct  
This is an estate given to one in  
special tail when the person from whom  
the issue was to spring is dead without  
issue or died leaving issue who is now  
dead, in such circumstances the tenant  
in tail becomes "tenant in tail after possibility  
of issue extinct." Litt 332. 2 Bl 124.

Here by operation of law an estate  
tail is converted into a species of life  
estate. It must be created by law it  
is impossible to grant such an estate  
(H) 2 Bl 125. If a grant were made to a man  
of an estate to hold "as tenant in tail after possibility"  
the grantee would probably take a life estate  
tho the books are silent on the subject.

If an estate is limited to A + his wife + <sup>to the heirs of their two bodies, begotten &</sup> they are divorced a vinculo matrimonii in civil law by the law of the country, neither of them <sup>afterwards</sup> ~~can~~ have this estate but they remain joint tenants for life if issue ~~is~~ extinct, (H. Co. Litt 28.) In such case the estate cannot descend + never is bequeathed for the issue are illegitimate.

In common cases where the marriage from which the issue is to spring is lawful the possibility always continues during the life of the parties (Litt 334. Co. Litt 28. 2 Bl 125) for in law the possibility of issue exists until one of the parties is dead.

This estate that elapses with estates for life is of a mixed nature partaking of an estate tail + an estate for life;

He is like a tenant for life, for he forfeits his estate by attempting to convey a fee

He is like a tenant in tail in that he is not liable for waste

Tho' a C. of Equity will restrain him from malicious waste.

2 Bl 125. Co. Litt 28.

Yet if he sells timber + leaves it on the land the profit is not his, it belongs to that person living at the time who has the next estate of inheritance in the land,

2 P. Wms 246. 2 Bl 125. c. note

It is regarded as a mere life estate to all intents except those mentioned supra.

Legal life  
Estates,

2<sup>d</sup> Tenant by the courtesy of Engl<sup>d</sup>

When a man marries a woman seized of an estate of inheritance & has by her issue born alive & capable of inheriting the estate she dying he is tenant for life of all such lands as tenant by courtesy.

Litt 535. 52. 2 Bl 126

To this estate there are four requisites all wh must concur,

1 Marriage

2 seizen of the wife

3 Issue born alive

4 death of wife

Co Litt 30. 2 Bl 127

Marriage

must be legal & canonical  
otherwise there can be no legal right in the husband

& it must be valid.

If he marries an idiot, If he marries within the cannon. degrees, he is not entitled to be tenant by courtesy for in these cases there was no legal marriage  
Co Litt 30. 2 Bl 127. 130 Plowden 263.



## Seizen

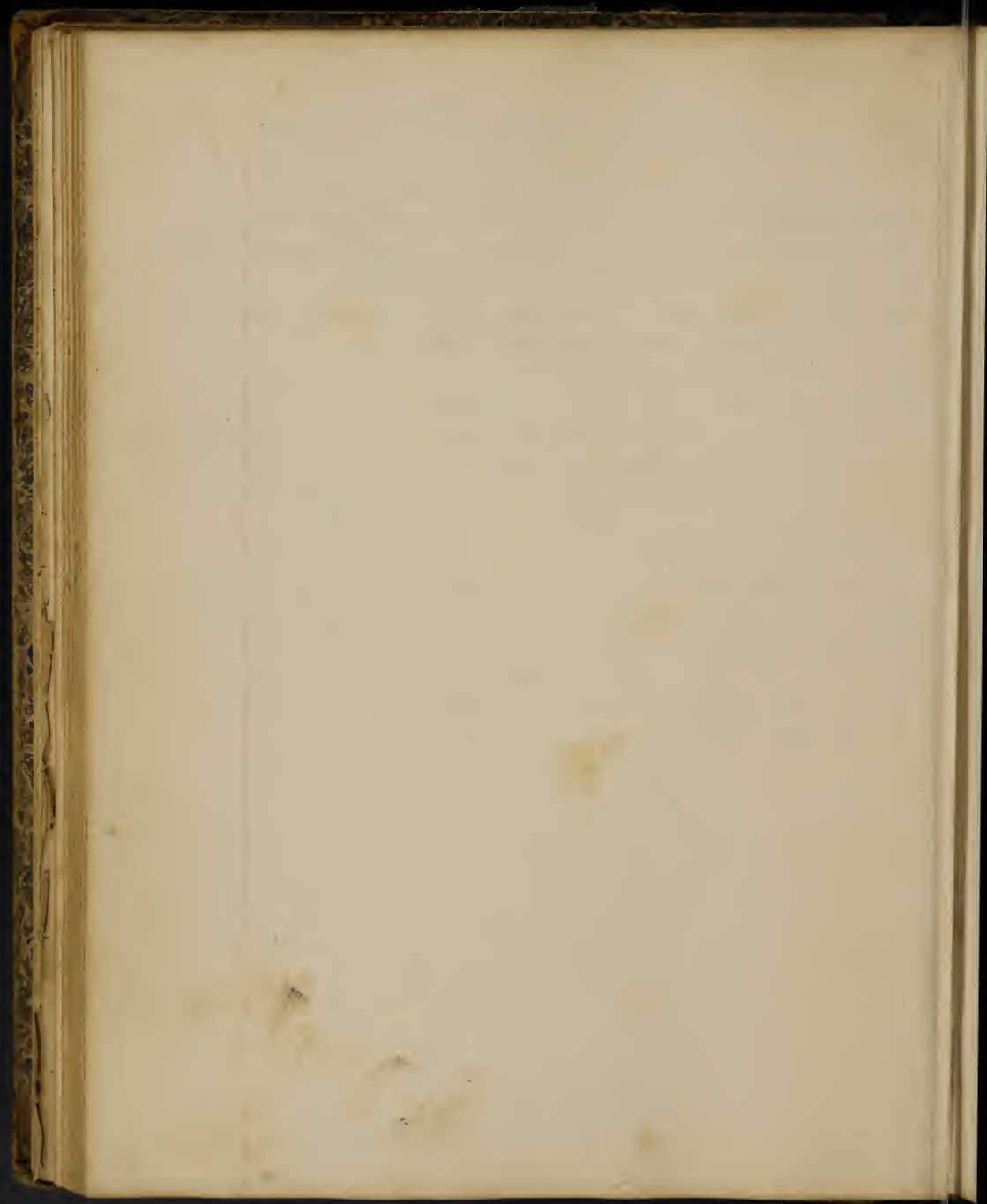
The seizen of the wife must have been an actual seizen & existing at her death —

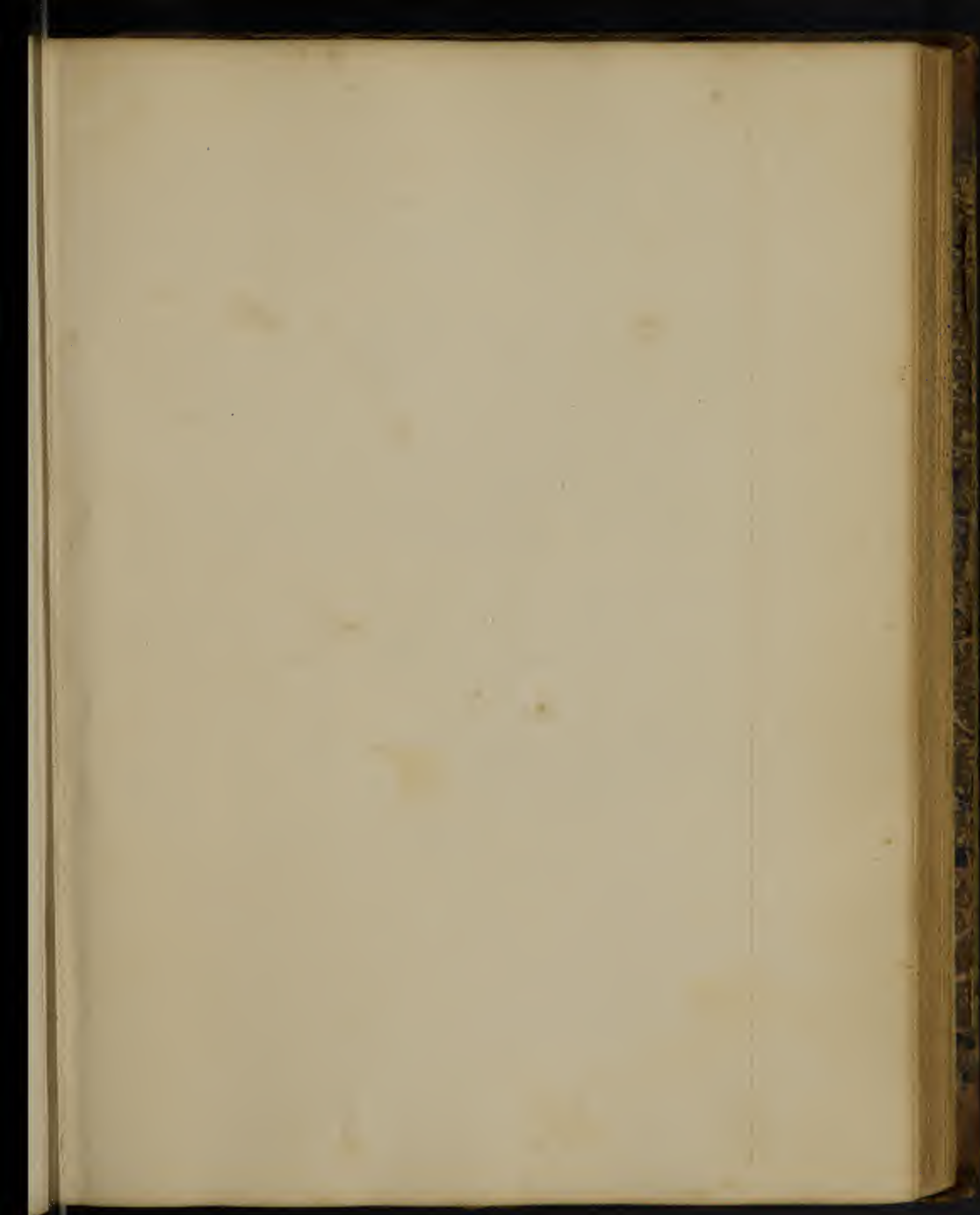
If the wife were dis seized & dies dis seized, the husband cannot be tenant by the courtesy, tho' the wife was entitled to the estate, 2 Bl 128. 2 Lev (129.) 26. But NP 158. 9.

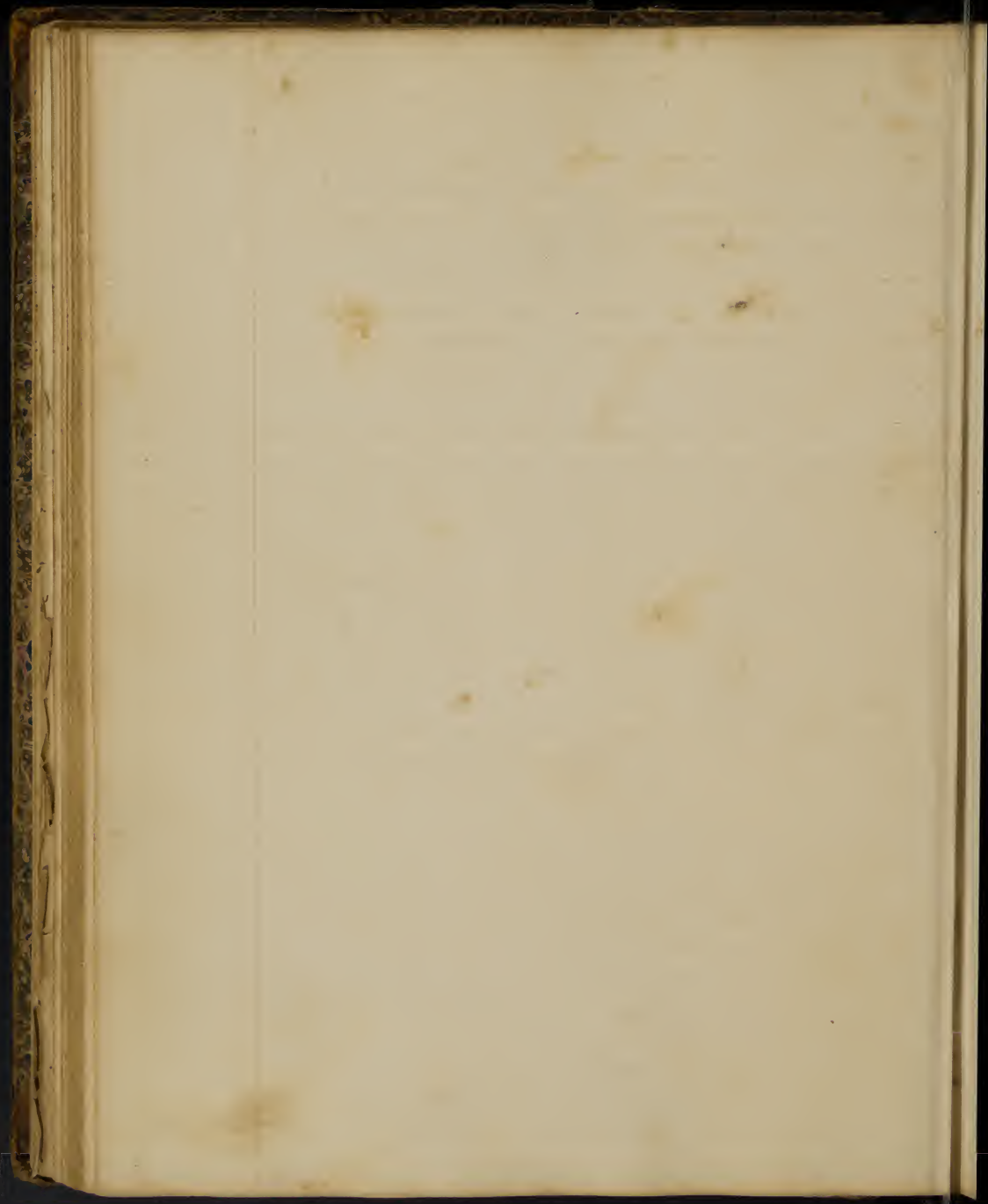
Co Litt 11. 15a — for here her issue c<sup>d</sup> not inherit from her,

This rule was exploded in this state — the C<sup>t</sup> supposed our Stat. law made a difference (3 Day 166. Bush & Bradley). For here by the issue of, a dec<sup>d</sup> ancestor may inherit from the dis seized ancestor, — The husband cannot be tenant by courtesy of <sup>after life estates, but seems of remainders after many years,</sup> remainders & reversions. For the wife cannot be seized of them. Another latter rule I suppose prevails in Conn<sup>t</sup> —

This rule requiring actual seizen in Co Litt 29 the wife does not apply strictly to 2 Bl 127. incapacitated hereditaments & to Equity of redemption &c. here what is equivalent to seizen will answer, & perception of the profits &c.









Real Property No. 3. Friday Dec 7<sup>th</sup> 1824

Ten't by courtesy

the third requisite to a tenancy by the courtesy  
is that the issue be born alive & must be born  
during the life of the mother. 60 Litt 29. Litt 356  
8 Co 34. 2 Bl 127:5

The issue must also be capable of inher-  
iting the estate 2 Blk 128. 60 Litt 29. I. E. the issue  
must be such as that by possibility they  
c<sup>d</sup> inherit,

It is immaterial however at what time  
the issue was born, whether during her seizin or not  
if it was during coverture (H) & it is immaterial  
whether her seizin was during the life of the  
issue -

And a husband is entitled to this  
estate in the wife's equity of redemption on a  
mortgaged fee 1 Atk 603. Powell on mort 112-115

On the birth of the issue the husband  
becomes tenant by the courtesy in natiuitate & then  
by the wife's death it is consummated.

2 Bl 128. 60 Litt 30

The third species of legal estates is  
Tenancy in dower.

If a husband seized of an estate  
of inheritance dies his widow has a life estate  
in one third part of all the lands &  
tenements of which he was so seized at any  
time during the coverture <sup>or</sup> with by possibility  
any issue which she might <sup>have</sup> <sup>had</sup>, could have  
inherited. Litt 536. 2 BL 129.

The widow in such case is called  
tenant in dower. <sup>the estate tenancy in dower</sup>

In the first place to entitle the  
widow to dower she must have been the  
actual & lawful wife of the husband at his  
death, If then they are divorced a vinculo  
matrimonii bars her of dower.

but a divorce a mensa et thoro  
is not a bar. The (2 BL 130. Co Litt 32)  
legal relation still continues,

It was formerly held that the wife  
of an idiot might be endowed but this is  
not law. 2 BL 130. Co Litt 31.

For the widow  
is at common law  
to the pecuniary  
law of the  
husband  
& as they cannot  
not inherit  
she cannot  
have dower.

By the ancient english law the  
dower was forfeited by the husband's treason  
& felony — But this at any rate is not  
the law here. 2 BL 130:1.

In the case of treason <sup>at the</sup> ~~the~~  
no treason can extend beyond the life  
of the traitor by the bonst. <sup>see</sup> Cons 465 act 3  
53. — With respect to common felonies I presume  
that they are no bar to dower in any state. That is  
the felony of the husband is no bar to the wife's dower.

An alien can not by com law be endowed  
except by express act of parliament. 2 Bl 131 Dowry  
Coditt 31. This rule is modified by the rules  
of some the western states. see NE of Ed Cuy  
tit alien. 2 John 339

But independently of these statutes 1 Gra & 125.  
If an American marries an Eng<sup>r</sup> or French 2 Rost 468.  
woman she can have no dowry unless by  
an express statute authorizing her to  
hold her dowry, — These rules of course  
contemplate an alien before naturalization.

By the English law a female above  
9 y<sup>r</sup> may be endowed 2 Bl 131 But not  
under this age,

But the estate in which the dowry  
may be had must be such as any issue of  
the wife <sup>which she might have had</sup> might by possibility inherit  
2 Bl 131. Litt 553. 36. A husd in fee  
simple having a son by a former wife marrying  
the second wife is entitled to dowry for  
in case of the first sons death her issue might  
by possibility inherit,

But on the other hand if a man hold  
lands to himself & to his issue by his wife a  
the wife B can have no dowry of such land  
for if a her issue could by no possibility inherit  
such lands.



Dower

Is entitled a wife to dower a seisin  
in law without a seisin in fact is sufft

That is she is entitled to all dower from  
all lands of which he had the right of  
possession (2d Cr. Eliz 513, for it is not in  
the wife's power to compel the hus. to take poss<sup>n</sup>

And a seisin of the hus. for any  
time however short during the coverture is  
sufft to entitle the wife to dower

In this case  
the land  
has not  
resided in  
the hus.  
an instant  
2 Bl 132.

but if the same act which  
gives the estate to the hus transfers it to  
another his wife is not entitled to dower  
Cro Jac 65. 2 Leo 67. Co Litt 31. 7<sup>th</sup> here the  
hus. is the mere medium thro' which the land is  
conveyed, And by the common law the hus. by

Co Litt 32.

no act of his own <sup>can</sup> exclude the wife's right to  
dower. no deed which he can give, such is the  
rule in most of these states but not here

In 2<sup>nd</sup> & 4<sup>th</sup> Mass the dower is barred from those lands of which  
the husband & wife have made a joint deed  
In Conn. the hus. may by his own  
act deprive of the wife of her dower for  
she has dower only in those lands of which  
the hus. has seisin in fact or in law.

It will dower,

But if hus.  
mortgages  
the wife  
is not  
entitled  
to dower in  
the reversion  
Ponch 319. 4.

In Eng<sup>d</sup> a wife is not entitled to dower  
in the husband's equity of redemption but this  
rule supposes the mortgage to be executed before  
marriage. for if it is made during coverture  
the wife holds in exclusion of the mortgage  
2 Co 94. Powell on Mort 321. 323. 1 Att 606  
3 P Wms 229. Salt 138. 1 Bl & 135. 161. 1 Br 69  
326. 2 Atk 585 (contra 2 P Wms 700. Pree in 64 127)

This rule was made when it was supposed  
that the wife of the mortgagee was entitled to  
dower but now it is well settled that she is not.



In this state however the wife in this case  
has dower 1 Con R 557. 6 John 290. 7 Do 278. Dower,  
So in New York, — how to prove in such cases see 1 Con R

By a law it is the duty of the husband  
heir at law to assign the wife her dower for  
he becomes entitled to the estate but if  
the heir or his guardian do not assign dower  
or does it unfairly she has her remedy at  
law in a writ of dower & by this writ the Shf  
is appointed to assign dower, to mark it out by metes & bounds

Co. Litt 34. 5. 2 Bl 136 The heir becomes entitled to the  
whole estate & the wife is under tenit to him —

In this state no writ of dower —  
it is here assigned by the judge of Probate he  
appoints commissioners to assign. & they return  
proceedings to him. subject to appeal to  
supt 6<sup>t</sup> but all the original jurisdiction of dower  
is in a Ct of probate, Fin Com before a person of qualifications  
For the manner in which wife may forfeit  
her dower see Tit "Hus & wife"

All estates for life are forfeitable  
not only by felony & treason but for waste  
or for aliening the estate for any other life  
than that for which he holds the land or incorporeal  
Litt 54. 15. Corditt 251. 2 Bl 267. 274. Litt 5415.

For proof that a wife dower is forfeited

Estate lep. than freehold

I. Estate for year

II. " at will

III. " by sufferance

An estate for year is one in land, ten: or her: for some determinate period of time, as for a year or more or for three months &c. 2 Bl 140. Litt 58. 67. ~~and~~

The party creating this estate is called lessor the tenant lessee.

By a year under this title <sup>in the English law</sup> is meant a calendar year, but by a month <sup>in the English law</sup> is meant a lunar month.

A month <sup>in the English law</sup> means a lunar month, with only one exception, <sup>in</sup> the case of noters &c. Co 61. 2 Bl 141. - But the term a twelve month means a year. (Id).

Tho' the law sometimes take notice of parts of <sup>a day</sup> yet as a gen'l rule a day is considered in law the punctum stans an indivisible point. 2 Bl 141. Co Litt 135. But where it is necessary for the plain purposes of justice the law will take notice of a fraction of a day. Every estate wh<sup>ch</sup> must expire at a fixed period by its own limitation is an estate for year. & therefore it is frequently called a term. Co Litt 45. 2 Bl 6 140.

c. Litt 46.

Antiently a term might be defeated by a fine or common recovery suffered by the lessor - Antiently these terms were considered of but little value but now by Henry 8<sup>th</sup> this rule is abolished,

It is said that an estate for years must have Estate for  
a certain beginning as well as a certain end years-  
but it will of course have a certain commencement  
for if no day is mentioned in the lease it will  
commence from the delivery of the lease

2 Bl 143. Co. Litt 46 sed vide + Cr 72.

'Id certum est quod reddi certum  
potest.' & hence if one makes a lease for so for when I  
many years as I shall name & I name names his  
a certain number this is a good lease for years years the  
lease has a

6 Co 35 2 Bl 143.

But a lease for so many years as certain ends.  
I shall live is void It cannot be an But here the  
estate for life because no life of seizen & because lease has no  
this is not intended by the parties. determinat

2 Bl 143. Co. Litt 45. (H)

Yet a lease for twenty yrs if I shall fixed until  
shall so long live is a good lease for years it actually  
for there is a fixed period beyond which it can ends. -  
not go. (H) Indeed this is clearly a lease  
for twenty years on a condition or with  
a defeasance

Every lease for years is but a chattel  
int. It is personal estate and is a trust for  
purpose of personal estate not to be, still nothing is required to

Of course livery of seizen is not nece  
to the creation of such an estate - & hence  
a lease for a term of years may be made to  
commence in future. 5 Co 94. 2 Bl 143. 4.

Hence a lease for years can never  
be said to be 'seized' of his term for years & is  
inadmissible in pleading. 'possessed' is the  
proper word 2 Bl 144. Co. Litt 46. Seizen is  
indicable only of a freehold



The word term is used either to express the duration of the lease or the estate itself  
2 Bl 144. Co Litt 45. Hence the term may  
end before the time limited

2 Bl 144. Co Litt 45. Hence the term may  
end before the time limited

Tenant for years unless restrained  
by express condition has the same estoying as  
tenant for life

2 Bl 144 122. 35. Co Litt 45 55.

If the estate determines at the  
limit express period. The tenant is not entitled to  
emblemments. But if the lease is Defeasible  
on a contingency before the term is expired  
& the estate terminates by that contingency  
the tenant or his reps are entitled to  
emblemments. 2 Bl 145 Litt 356. 55. & If tenant for  
life leases for 20 yrs & tenant for life dies tenant for years is  
entitled to emblemments. - On the other hand if the estate is  
determined by the act of the tenant himself  
he forfeits the emblemments. precisely as in  
the case of tenant for life, or tenant for years forfeits  
the estate, he is not entitled to emblemments

Estate at will is an estate deter-  
minable at the will of either lessor or lessee 2 Bl 145.  
Litt 55. So Raym 707. 1008. Co Litt 55.

Such an estate has no determinable period  
but if the lessor determines it between sowing & harvest  
the lessee is entitled to emblemments sown not. 2 Bl 146  
Co Litt 45. 55. 6. so lessee has right of ingress & egress to remove fruit

This estate may be determined, by the express  
declaration of the lessor or the land, or to the tenant,  
or he may determine it by any act interfering with  
the tenant's possession 2 Bl 146. 1. Ven 248. Co Litt 55.

& by various other acts showing an intention to  
determine the estate.



It is determined by the death or outlawry of either party 5 Co 116 2 Bl 146 Co Litt 52 at Will

If the lessee determines the estate or from year the lessee has an absolute right to enter & take to year, away his furniture &c. Litt 569. 2 Bl 147 -

Those who were formerly estates at will are now generally construed into tenancies from year to year (5 Co 116. Exp Dig 400. 2 Bl R 1173. 2 Bl 147. 3 Bl R 1609) so long as both parties may chose -

The estate of a mortgagor in possession is an exception to the last rule he is as to the right of possession a tenant at will - For he never has, lent at will not any lease but at will, the statute is not, really, an exception

There is an important diff. between tenancies from year to year, and at will for the former cannot be determined by the will of either party alone except at the end of the year, & not even then without express previous notice given by the party who intends to determine the estate 1 TR 159 163. 2 Br 69 166 168. 5 TR 3. 7 do 14. 55. 4 do 361 2 do 436. Exp Dig 460-4. By the end of a year is meant the end of a year from the commencement of the estate -

And even tho' one of the parties die six months notice must still be given either by the heir or administrator &c or to them 2 Bl 247. Coote. 3 Will 25 2 TR 159. This estate therefore is, not like an estate at will ipso facto determined by the death of either party.

The English statute of frauds & perils: states that parol leases for more than 3 years shall inure as tenancies at will, yet they are now construed as tenancies from year to year the exp. words of the statute notwithstanding. See Abt agree. 5 TR 3. 2 Bl 145 & n

No parol lease for any time however short is good law in Court & sed per

Estate from year to year The notice given with a view of determining the estate must be to quit at the end of the year  
It is suff<sup>t</sup> however to give a year's notice to quit 15 R 159. 2 Bl 147. b.n.

If after the landlord has given notice to quit, he receives rent accrued after the year he confirms the lease for another year  
6 J R 214. 1 4 Bl 311. 2 Bl 141 (C.N.)

2 Bl 147. n If the notice given is not good for the year for wh<sup>ch</sup> it is given it is not good for any subsequent year. 2 Bl 147 161.

For it is not notice to quit at the end of the next year, <sup>But unless such a tenant denies the title of the landlord, he cannot defend in an action of ejectment because he has had no notice to quit.</sup> 2 Bl 147. b.n. for he cannot at one & the same time deny his landlord's title & claim notice as ten<sup>t</sup>

Where there is a lease for a year & the tenant continues in poss<sup>n</sup> after the year with the landlord's consent he is regarded as tenant <sup>from year to year</sup> another year - He however is not a tenant from year to year for this is a lease for years (& therefore he need have no notice to quit) 1 Powell on l<sup>and</sup> 258 15 R 162. - The continuance of the lease in poss<sup>n</sup> by consent is an implied contract to renew the lease on its original terms - And where there is only this implied agreement notice to quit is neccy as to the subsequent year tho' not for the first - for the continuance with consent creates a tenancy from year to year, and does not merely renew the lease for another year.

The chief difference then between ten<sup>t</sup> for a year & ten<sup>t</sup> from year to year is that in case of the latter tenancy notice of determination must be given 6 months before the end of the year whereas, no notice is necessary in case of tenancy for a year.

In Court. tenancies from year to year are unknown & under an stat<sup>e</sup> of fraud, cannot exist without a written contract -

Estates at sufferance,

If a tenant comes into possession of land by lawful title & afterwards keeps it without any title he is called a tenant at sufferance

This differs from the case before stated for the continuance is here without consent

2 Bl 150 Co Litt 57.

And formerly if a lease at will was made to A & he continued on the estate without consent, after the death of the lessor he was considered as tenant at sufferance. But now if the lessor dies the lease is not determined (ante) the tenant now continues tenant from year to year. 2 IR 159. 3 Wils 25. 2 Bl 150. Co Litt 57.

A tenant at suff is not entitled to any notice to quit, his estate may be terminated at any time by entry of the lawful owner, but the owner cannot maintain trespass <sup>or something of the kind</sup> until entry, or something of the kind. 2 Bl 150. Co Litt 57. For the <sup>by some public act is entry</sup> entry is presumed to be so until declared otherwise. To recover possession then by law the owner must actually enter before he prays out his ejectment. 5 Mod 384. 2 Bl 151.

But as before stated the tenant is not entitled to any notice 1 IR 162. 2 Bl 150. 1 Co.

But in Engl<sup>d</sup> the H & H Geo 5 have nearly put an end to this species of tenancy.

here we have no such statutes. These statutes (2 Bl 150) have destroyed the few privileges of this ten<sup>t</sup> & subjected him to some hardships unknown at CL.



## Estate in poss<sup>n</sup> Remainder & Reversion

This regards the term of enjoyment not the quantity of inst<sup>s</sup> in the owner,

Estate in possession & estate in expectancy include all estates whatever their quantity or inst<sup>s</sup> may be

estates in expectancy are divided 1<sup>st</sup> One created by act of the parties called remainder 2<sup>d</sup> One created by the act of the law called reversion. These are all known to the com. law, but a new species have lately been introduced under the st of devises called executory devises—

### Estate in possession

All estates of which I have so far treated are taken to be estates in possession,

actual poss<sup>n</sup> is not necessary to make it an estate in poss<sup>n</sup>, the right of poss<sup>n</sup> is suff.

By an estate in possession a present estate pass<sup>g</sup> not depending on any subsequent contingency, together with a right of present enjoyment, Flame 1. Powel on Dec 249.

2 Bl 163.

An estate in Remainder is not limited to take effect <sup>immediately</sup> after another estate in the same subject is determined by grant by tenant in fee simple to & for life remainder to B in fee,

2 Bl 164. Co Litt 143.

But the particular estate & the remainder are equal to one estate in fee only if the remainder is in fee.— in other words they are diff<sup>t</sup> parts of one & the same whole 2 Bl 164. 2 Woodes 186

No remainder can therefore be limited to take effect upon a fee simple for a fee simple exhausts the whole estate 2 Bl 164. Plow 29.



By the way of executory devise indeed one free estate in  
may upon a certain contingency be substituted Remainder.  
for another but this is unknown to the  
com: law.

The most proper term for the creation  
of a remainder is the word remainder itself  
tho' not the only word used in deeds. Ex: to A for life  
& after his death (Powell on Dec 242. Plow 134. 159. 170)  
to B this gives B a good remainder -

In relation to the mode of creating a  
remainder. there are 3 rules.

II To create a remainder there must be  
some particular estate precedent to the <sup>estate in</sup> remainder  
i.e. there must be some par: pre: estate to expire  
before the remainder is to take effect, in pos:

In the law of remainder the precedent estate  
is called the particular estate.

See title 47. Powell on Dec 249. 2 Bl 165.

There may indeed a future estate be  
created without a particular estate but this  
future estate in such case is never a remainder  
for the word remainder is a relative term implying  
that some part of the same thing is previously disposed of

2 Bl 165 -

But a freehold cannot at common <sup>a freehold</sup>  
law be created to commence in futuro tho' it <sup>estate must</sup>  
may be by executory devise. No mode known <sup>at the present</sup>  
to common law of conveying an estate will <sup>in possession</sup>  
allow it to commence in futuro. because <sup>of remainder</sup>  
at a law there is no mode of conveying a  
freehold except by livery of seizen & livery  
of seizen is the delivery of the present corporal  
possession of the freehold. Feaf 234. 5 Co. 94  
2 Bl 165. Raym? 151.

Another reason why an estate of freehold cannot be created in futuro without a present estate for the policy of the law is to prevent the freehold being in abeyance. & the evil of allowing it to be in abeyance is that there would be no debt to a real action or the precipe & there is no mode except by a real action to recover the possession of the inheritance for the real action can be brought only against the tenant of the freehold in possession.

2 Wils 200. 2 Wils 166. Termes 234.

Raym? 151. 2 R 362.

But there is one exception to this general rule at the common law. I allude to a freehold rent when it is granted de novo it may be limited to take effect in futuro but it cannot after it is created be transferred to take effect in futuro. 2 Vent 204. 1 Lev 144. folio 577. Plon 156. D

one page after  
the next.

\* In the creation of a freehold remainder a freehold must pass immediately at the creation of the particular estate.

In the creation of contingent remainders the freehold does not pass at the creation of the particular estate but a freehold must pass.

An estate is given to A for life remainder to B & his heirs here the immediate freehold vests.

But an estate is limited to A for years remainder in fee to a son of A yet unborn here no freehold passes & the freehold remainder is void.

But if it were to A for life the remainder would be good for A would then take the freehold.

Both the reasons for not creating a  
freehold in futuro without a particular  
estate have ceased practically to exist.

For loss of seisin is out of date

+ there is no need at present of a real  
action for an action of ejectment lies,  
yet the rule is adopted in law

In one case a real action is necessary by the  
Act of limitations

Loss of seisin necessarily takes effect  
in presenti

Suppose a grant is made to A for life  
remainder to B in fee simple. Here loss of seisin is  
made to A, in presenti, in favour of B indeed

But suppose an estate to A for  
years + remainder to B <sup>in fee</sup> here loss of seisin is  
given to A yet A inures to the benefit of B  
+ B is vested with the freehold consistently with  
the estate of A. for both interests make but  
one estate, § 136.7.9. Here B's interest  
commences in presenti to be enjoyed in  
futuro.



estates  
in Remainder last.

\* ~~Expl~~ <sup>Explanation</sup> of the rule examples & on page before  
on the creation of freehold remainders in  
freehold must pass out of the grantor at the time  
when the remainder is created <sup>such</sup> freehold  
remainder is void <sup>if the person is made</sup> ~~regularly passes~~ to the grantee  
of the particular estate to inure to the benefit of the  
grantee of the remainder and the position of the grantee  
is deemed the position of the grantor of the remainder  
in this case the freehold passes out of the grantor at  
the time &c. But if the remainder were contingent  
as to it for life then in case B survives him to  
B in fee. Here ~~B~~ <sup>con</sup> takes a freehold but the freehold  
i.e. the freehold of the remainder he does not  
take for that freehold does not vest in B unless  
he survives A the freehold therefore he does not  
take & D.C. says he need not take to make the  
remainder good. a freehold is suff<sup>t</sup> & this he takes  
for his estate being for life is a freehold estate  
tho' Bl says (Bl C 2 vol p 171) that the freehold must  
pass out of the grantor.

From the gen<sup>l</sup> rule it will follow  
that if an estate is granted to B for a term of  
years & in case he dies without issue remainder to  
C in fee the remainder is void for no freehold  
passes B can take no freehold for himself for his  
is not a freehold estate he cannot take livery of  
seizen for C for C's estate is contingent

But if an estate is limited to A for  
years remainder in fee to a son of B yet unborn the  
remainder is void for no freehold can pass <sup>a freehold</sup> & cannot  
pass to it for A's estate is not freehold & he cannot  
take livery of seizen for a person unborn.



Real Property (Monday Dec 6th 1824.) 1/4

A lease at will is not suff<sup>y</sup> to support any Blackstone's  
remainder 2 Blk 1167. s. 6078. 5. Ray<sup>o</sup> 151. It is too slender <sup>reason for this</sup> <sup>is engaged</sup>  
an estate to be deemed part of the inheritance <sup>the estate of</sup> <sup>ten't at will</sup>

If the particular estate is void for <sup>any of the reasons</sup> ~~any~~ reason, in the beginning the remainder engrafted <sup>by the conveyance</sup> on it is void for there can be no remainder with 2 Woods, 1796 (1) out a particular estate & a void part estate is, no Pond 414. estate. Co L 298 2 BL 117. The remainder must

estate. Sec 298 2 Bl 117. The remainder must  
fail as a remainder but if it is limited by devise it may take effect as being  
in any devise. If the particular estate tho good on  
its creation is afterwards defeated before it  
expires by its own limitation the remainder it  
is said must fail because the defeating of  
the particular estate, the case is as if there never  
had been any particular estate 2 Bl 167.

The rule is too general for as to vested remainder the gen'l rule is the reverse of this tho' as to contingent remainders it is perfectly true. If an estate is limited to A for life & an unconditional remainder to B, if A forfeits his estate B's remainder takes immediate effect. 2 BL 176. 169.

155. 2 Woodes 180: 6: 7. 2 4 B 155 The true distinction is this — In the case of vested remainder, if the particular estate for life is defeated during the tenant's life by any thing which avoids his estate as in the case of the remainder, tho' vested, must fail for the livery of seisin is here destroyed. But if the life estate is defeated by any thing which does not avoid it as in the case of the remainder, but merely terminates it from the act done, the vested remainder is even accelerated by the defeat of the particular estate.

Keare 204. 234. 241. 244. 261

Estates in  
Remainder

2<sup>d</sup> The remainder must emanate a part out of the grant at the time of creating the particular estate. This is not true of particular contingent remainders the meaning is that the absolute & contingent <sup>right in</sup> remainder must be created at the time of creating the particular estate.

Suppose an estate to A for life and remainder in fee to the first unborn son of B. the remainder does not pass out of the grantor at the time of the ~~contingent~~ right in remainder does pass out of the grantor at the time of the creation of the particular estate. Pond on Dec 242:3

2 Bl 167. Litt 50.71 C. Litt 49. 2 Woodes 177.

The remainder then vests in inst in the unborn son when he is born if the particular estate is existing at that time

But before his birth the inst in the remainder is in the grantor & his heirs. Co. Litt 262.3. Fearn 206. 275. 285. C. 267

This rule is true however with regard to vested remainders here the remainder is vested in interest in the livery of seizin to the particular,

A remainder cannot be limited on an estate already in being i.e. on a particular estate created at a preceding time for in this case what appears to be a remainder is a reversion. Fearn 228. 2. Bl 165

The particular estate & the remainder must be created at the same time (by the same instrument)

3. The remainder must vest in trust in the remainder man during the continuance of the particular estate or so instanti when the particular estate terminates, *Term* 237:41:7  
*Pouss* on Dec 243. 2 Bl 168. 2 Woodes:179:80  
1 Co 88. 138. 3 Co 21. Plow 25.

(the executory devise for an exception)

The particular estate & remainder make an estate & there can be no chain between them - if to A & B for their joint lives remainder to the survivor in fee here the remainder is contingent but it vests in interest & must vest in interest & in possession instanti or when the particular estate determines -

But suppose an estate to A for life remainder to an unborn son of B. now if B's child is born during the continuance of the particular estate all is well but if A dies before he is born the remainder fails -

Ex to A for life remainder to B to take effect one hour after A's death the remainder is void Plowd 25. *Term* 234 during this hour there is no particular estate -



vested & contingent remainders

An estate vested in possession is one of wh<sup>ch</sup> there is a right of present enjoyment

An estate vested in int<sup>y</sup> only is one in wh<sup>ch</sup> there is a present fixed right of future enjoyment

A contingent estate is one wh<sup>ch</sup> is to accrue in int<sup>y</sup> upon some future uncertain event & in wh<sup>ch</sup> there is no present fixed right either of a present or future enjoyment

Farne 142

A vested remainder then is one by wh<sup>ch</sup> a present fixed int<sup>y</sup> passes to the grantee to take effect in future in possession Farne 183  
Powell on Dec 343. 2 Bl 118.

A vested remainder is one vested in int<sup>y</sup> only not in possession.

Contingent or executory remainders are those by wh<sup>ch</sup> no present fixed int<sup>y</sup> passes to the remainder man but such as are to vest in int<sup>y</sup> hereafter on some contingent event. When such a remainder becomes vested in int<sup>y</sup> it becomes a vested remainder.

3 Co 20. 2 Woodes 191. 4. Powell on Dec 250

2 Bl 119. 170. 1 Bos & Pul 215. Salk 228 4. Mott 282, Farne 213. 4.

When the remainder becomes vested in possession it ceases to be a remainder & becomes an estate vested in possession.

Whenever a remainder vests in int<sup>y</sup> during the continuance of the particular estate it will vest in possession when the particular estate determines. On the other hand if the remainder does not vest in int<sup>y</sup> during the continuance of the part<sup>r</sup> estate or co instanti &c it can never take effect in possession.



But if by the terms of the grant a remainder <sup>Contingent</sup>  
cannot vest in possession during the continuance of the particular estate or on the termination of its determination the remainder is void. & if in any way it does not so vest the remainder is void. —

10 & 11 Wm 3<sup>d</sup> enables posthumous children however to take a remainder when the particular estate is limited to the father for life —

1 Bl Com 130. 2 Bl 119 Talk 228  
2 Co 51 2. Wm 200 4 mod 232

Our courts have adopted this statute as our common law. —

A remainder limited to one not in being must be limited to one who may by com<sup>o</sup> possibility be in being at the termination of the particular estate since it is void at common law. 2 Bl 109:70. Fearn 175  
2 Co 51 2 Bl 172 Com. 1 Co 66b

If an estate is given to A for life he himself being unborn & remainder to the heirs of B the remainder & particular estate is void.

If limited to A for life remainder to the heirs of B's first born son, <sup>yet unborn</sup> the remainder is void as there is a remote possibility only of the event taking place which forms the contingency. There must be only one possibility & contingency.

Hot 33 Co Litt 25b 184 a  
2 Bl 170. If such remainder were good the estate would remain too long unalienable.

## Contingent Remainders,

January 21st 1841

A remainder to B the unborn son of A is void because there are here two possibilities upon which the remainder depends for A must have a son & he must be called B.

2 Co 51 Fearn 177. 2 Bl 170.

And a remainder limited on the happening of some unlawful event is void ab initio probably on the ground of policy, tho' the reason given is that the contingency is too remote.

A remainder on this principle to an unborn illegitimate son of A is void 2 Co 51. Croly 579 Fearn 175. 5 Blk 170.

A contingent <sup>remainder</sup> estate of freehold cannot be limited on an estate less than freehold

(note) for to create a freehold remainder a freehold must pass from the grantor, at the time of creating the particular estate the freehold if it passes must rest somewhere & it cannot rest in the remainder man for his estate is contingent therefore a freehold contingent remainder must be limited on a freehold estate 1 Co 130 Ray'd 151. 2 Bl 171 2 Wodes 199.

A contingent remainder may be defeated by a termination of the particular estate before the contingency upon which the remainder is to rest in fact happens & therefore the remainder man is in the power of the tenant of the particular estate when the remainder is contingent 1 Co 66. 135. 2 Bl 171 Fearn 241. 4. 248. 322. 58. 62. 72. 2 Lev 39.

And a contingent remainder may always  
be barred by a fine levied or a recovery  
suffered by the tenant of the particular  
estate. 2 Bl 171. Co. Br. Eliz 130. Salk 224  
1 Co 66 for the particular estate is determined  
by the fine &c. but a vested remainder is in such case  
accelerated. And the consequence is the same tho  
the recovery were suffered by the particular tenant  
for his own use for the particular estate upon  
which the remainder was limited is gone before the  
contingency 2 Woodes 186. 7. 1 Co 66. -

But a determination of the partic-  
ular estate actual seizure before the contingency  
does not of course defeat the contingent remainder  
for the freehold in the tenant of the particular estate  
is still in effect.

Suppose the part. tenant is seized  
& dies seised before his right of entry is  
barred by Stat of Limitations the remainder  
is good 2 Woodes 196. 7. 1 Co 66. 7. 12 Mod 174. 1 Co 66. 7. - But where the right of  
entry is barred the remainder fails -

From the liability of contingent  
remainders to be defeated by fine & recovery &c.  
arose the practice of appointing trustees  
to preserve contingent remainders.

As in this form a limitation  
was made to A for life, remainder to B & C & D.  
for life of A, remainder to an unborn  
child or any one on contingency. the rema-  
inder to B is to provide against the forfeiture of A by treason &c.  
B is considered trustee. 5 Co. 51. Co. Litt 378  
Hob 33. 2 Bl 171. 2. 1 Nes 42. Stearne 84. 87. 8  
95 - 123. 152. 7



Contingent This expedient was devised during the  
Remainder civil war of the Houses of York & Lancaster,

To decide the question whether a  
remainder is vested or contingent

It depends not upon the prob<sup>ab</sup> of its ever taking effect in possession  
but upon the nature of the limitation that  
is upon the remainder's being limited  
absolutely or on contingent events i.e.  
on condition. 2d Raym 523:4. 2 Woodes 181:2  
184:5. 192. Hob 30:1. Salk 232:3.

The actual enjoyment of a remainder  
is frequently always contingent.

If an estate is limited to a for  
life & if he dies without ho of his body to B.  
there is a vested remainder here is a condition  
in language but it is tantamount to this  
to A & the ho of his body & remainder to B  
or to A in tail remainder to B.

What does make the distinction  
It is universally the uncertainty whether  
a remainder will vest in interest w<sup>h</sup>  
makes a remainder contingent & if it is  
not now vested in int it is of course  
uncertain whether it ever will vest in int.

2 Woodes 192 Fearn 149.

Tho a grant to a for life  
remainder to B in fee is a vested remainder  
but to a for life remainder to B in fee if  
B survives a this remainder is contingent  
for by the terms of the grant B has no int  
in the remainder unless he survives A  
2 Bl 170.



Universal criterion by which to distinguish vested from contingent Rem<sup>rs</sup> Is the present capacity of taking effect in possession if the estate should this moment determine. all things else remaining as they are. If there is this capacity it is vested seas not. Fearn 149. 2 Woodes 192

Grant to A for life remainder to B in tail immediately after the creation of this estate the question is is this remainder vested or contingent? Answer this question & you answer that, if A's estate should at this moment end would B's remainder take effect in possession? It would therefore B's is a vested remainder

Grant to A for life remainder to B if he survives A. is A's remainder contingent? Could A take immediate possession if A's estate should <sup>end</sup> at this moment by future? He could not therefore his remainder is contingent.

If an estate is limited to two persons for their joint lives & with remainder in one went to one & in another to the other then remainder are denominated cross remainders.

Co. 31. H. 33

Crop  
Remainder

It has been said that crop remainders cannot arise between more than two bro Jac 155. 41 Bac 333 or 701 Remainder Div crop rem.

But the rule is this, when crop remainders are claimed by implication between only 2 persons the construction is in favour of supporting the crop remainder, but when they are claimed to arise by implication between more than 2 persons the construction or presumption is ag<sup>t</sup> such crop remainder yet this presumption may be rebutted by manifest intention either way

Coz 780: 97. 2 East 36. 40. 46. 1 East 229

Again it has been said that crop remainders can only be created by devise. not by deed. 108 Litt 25 Bac Abri Rem Div crop Rem.

This rule is not law.

A crop remainder cannot be created by implication in a deed tho' it may be in a devise 1 East 46 - (so of ambistate tail)

Example of crop remainder in a devise. If a devise is made to A & B for their joint lives, remainder to D if A & B both die without issue A & B take crop remainders in tail by implication

1 Day 300(a)

— It has been supposed in Court that under our Stat a freehold estate can commence in futuro when created by deed - sed non sic videtur Indici 9d

Devise is a species of expectancy similar to Executory  
a remainder & the term sometimes denotes the inst & Devised  
sometimes the means or testamentary act by which it is  
created. 2 Bl 172

It is defined to be the devise of an inst to  
take effect not on the test's death but on some  
future contingency 2 Bl 172 1 Eq ca. 106 Farn 298

This is an illogical def: for it includes  
all contingent remainders

The true def<sup>n</sup> is this It is such a limitation  
of a future inst by will as the law admits in wills  
but not in common law conveyance as Goodrich  
Farn 295-8. 303. 2 Saund 388. 3 TR 487. 763  
2 Ves 611. 2 Woodd 222. (arg) 204

But even this merely refers to a collat  
teral test & is not logical

It follows that if such a limitation  
of a future inst as would be good by the way of  
conting<sup>t</sup> remainder <sup>in intestate</sup> is made by devise It is good as  
a contingent remainder & is not an executory devise  
Farn 299. 302. 2 Woodd 222. 3. Doug 727. Guth 310  
41, mod 258.

Ex devises are of modern origin viz in the  
reign of Elizabeth 3 TR 43. 45.

They are allowed merely out of  
indulgence to a man's last will & testament  
2 Bl 172. Farn 299. Powd on Dec 250. 2 Woodd 221

An Ex Devise as to the mode of its  
creation differs from a remainder in 3 respects

1<sup>st</sup> the way Ex devise a freehold may be  
made to commence in futuro without any  
preceding particular estate

2<sup>nd</sup> In the way of Ex Devise a fee simple or  
other estate may be limited after a fee simple back 229  
on the same subject or rather one fee simple  
may be substituted for another. 2 Bl 173. 378



Ex'ory  
Devises

3<sup>d</sup> By such devise a remainder may be limited on a chattel inst after a life estate in the same subject  
(2<sup>d</sup>) Powell on Dec 238 250. Fearn 305:16 10 Mod 420

If a contingent limit is made by reason to depend on a preceding freehold capable of supporting it as a remainder & if the preceding estate fails before the testator's death by the death of the first devisee the second limitation will survive as an executory devise.

The reason is at the testator's death the limitation is as a limitation to the remainder man which by the way of executory devise is good for a freehold may be created in future  
Fearn 401. H18-20 Fulbot 44 Doug 325. 476n  
Contra 12 Mod 128 Fearn 401 - & the devise takes effect from the death of the testator.

II. By the way of ex devise a freehold so that a man may devise a freehold estate to A to take effect on the day of A's marriage he being an infant at the time of the devise  
So a Devise in fee without preceding estate to the heir of A when A shall have an heir

Even if at the death of the testator A has no heir on A's death his heir at law will take the estate. Fearn 303:4. 2 BL 173.

2 Woodes 233. Powell on Dec 255. 1 Eg. ca 188.

Salk 226. 229. In then cases the fee simple descends to the heir at law of the testator on the testator's death subject to be divested on the happening of the contingency by the devisee  
2 Woodes 233. 1 PM 505. Doug 481 note



2 By a devise a fee simple may on some contingency be substituted by another fee simple. Thus a devise to A & his heirs but if A shall die before the age of 21 to B & his heirs. Such a limitation by devise is good tho' in the way of deed it would be utterly void.

Again if one devise to A & his heirs provided that if B shall pay \$100 to A by such a time the land shall go to B & his heirs this last lim. by devise is good. *Fearne 303. Talk 229. 2 Bl 173. 398. 2 Med 289. 2 Woodj 181. 186. 226. 1 Eq. ca. 310. Frame 416. Powd on Dec 250:1 10. New 420.*

3 By ex. devise a remainder of a chattel int. may be limited over on some contingency &c.

This is at com. law impossible for the disposition of a chattel for life as a disposition of it in toto. at com. law. (as to estates for years *Cruise 272*)

If I having a term for years devise it to A for life & on his death to B. B on A's death takes the unexpired residue of the term. *5 Co 95. 2 Bl 174. 2 Worder 235:9.*

A such a limitation may be made in any chattel not perishable - plate jewels watch &c.

Formerly a distinction between use of a chattel & remainder over. & the chattel itself & remainder over. but this distinction is now exploded. *Fearne 304. 2 Bl 398. 174. 1 P Wms 1. 5 Co 95. 10 Do 46. Cro Jac 346.*

Such a remainder may be limited to any number of persons <sup>successively</sup> for life with remainder over thus to A for life remainder B for life &c. & then remainder to C. but they must all be living in being except the ultimate limitation.

ex:ory  
Devises

These three distinctions between ex:devises  
& remainders relate to creation

Nature of the 2 estates. the essential  
difference is that remainders may be  
barred by fine a reco<sup>v</sup> suffered by the  
par: tenant. but ex:devise cannot be so  
defeated.

The reason is that the ex:devise  
does not in any sense depend upon the  
estate of the particular tenant. there is no  
need of a particular estate to support an  
ex:devise 2 Bl 175. Co. Jac 593. Fearn 336  
314. 2 Woodes 227. 10 Co 59 Bo. C. 185

But from this very fact has  
arisen the necessity of a gen<sup>l</sup> rule fixing  
a time within which the contingent event  
must happen in order to render the ex:  
limitation good.

If the contingency on which the  
ex limitation is to rest must not by  
the terms of the limitation happen with  
in this prefixed period the ex: lim: is  
ab initio void. for as it cannot  
be barred by fine recovery &c if this time  
was not fixed a perpetuity would be  
created.

Fearn 314. 5 2 Bl 175. 4  
2 Woodes 230. 1 12 Mod 217. Aick 224.

A devise to be good must be so limited as to take effect if at all within a life or lives in being at 21 years & a fraction afterwards & so limited by its terms 2 Bl 174  
Pearne 314. 318. 19. 356. 7 ER 595. 100. Salt 228  
Doug 590

Thus one may devise to the first unborn son of A. for this must happen within A's life or a fraction afterwards

Or to the first unborn son of A when he shall attain the age 21.

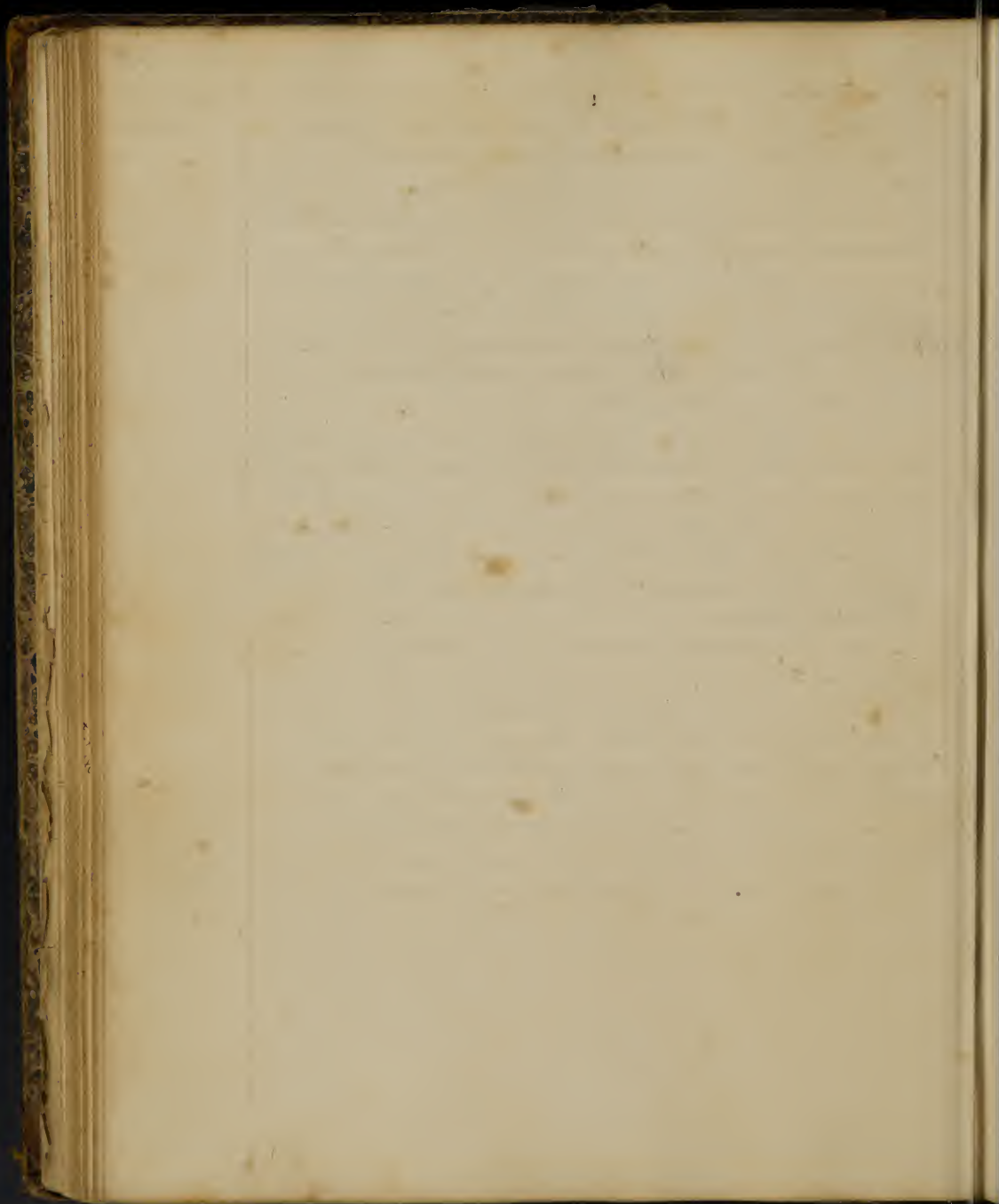
Or to A & his heirs on condition that on a certain contingency it shall go to the first unborn son of B on his attaining the age of 21

If then according to the terms of the devise the ultimate contingency may possibly happen at a more distant period it is void at its creation

Hence a devise to the unborn son of an unborn son is void

To render the ultimate limitation good within this rule the ult. con must necessarily happen within this period or it is void

Pearne 314. 2 Bl 174. 1 Wilson 207  
Pearne 200. 320. 355. C.





Real Property 135 (See 137/124)

Executory Devices

In *Wm. Blackstone* lays down the rule that all the remainder men of a chattel trust must be in being in the living the life of the first devisee & that the contingency must happen during the life of the first devisee.

2 Bl 174:5

But this rule is incorrect.

The limitation of a chattel trust may be for any number of lives in being, & remainder to an unborn child & now the period for the taking effect of the remainder is the same in a chattel trust as in real property.

Trane 320:1 355:6 3 ltr 382/252

1 J.R. 252:102 2 P.M. 421 2 Wood 230:1

2 Br 1730. 1 ltr R 351 395 1 ltr 234

If an ex: devise is limited to take effect after a gen'l failure of issue on the part of a prior devisee the limitation is not invalid. *Powell on Sa* 428. Trane 315-22: 341-

2 Wood 232:3. 241. Tail 268. 2 P.M. 577 1 Eq:ca:156

This rule holds as to all three sorts of ex: devisees. This is not an arbitrary rule; the words 'if he dies with issue' mean if the issue shall ever fail, - & if any other construction were put on the words an estate tail could never be created by implication -

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that is "At present the limits of executory devises of real & personal property are precisely the same (2 Bl 175 (h note))"

Long  
verses

If a devise of land is made to A & the  
heir of A & if he dies without heir of his body  
to B this remainder to B is <sup>good</sup> as a  
~~contingent~~ remainder tho' <sup>good</sup> ~~not~~ as an ex. devise

3 TR 145. 6. Pow on Dec 431. Salk 234  
1 PM 23. Farn 170. 301. Cow 234. 7 TR 276  
A then takes an estate tail & B the  
remainder.

And notwithstanding the gen'l rule  
if there are other words in the devise showing  
that the clause respect dying without issue means  
not a gen'l failure of issue but a want of issue  
at the death of the first devisee or at the death  
of any other person in being, the ex. devise is  
good as an ex. devise for here the contingency  
is to happen during lives in being.

Farn 352— Salk 225. 1 Woodes 207  
3 Atk 282. 1 PM 432. 3 H 258. 3 TR 146. 7 H 322  
Pow on Dec 351. 2

If a lim: is made to A & if he dies without  
issue or without his of his body to B for life this  
lim: is good to B as an ex. devise for here B must  
take within his life i.e. within a life in being or  
not at all 2 Woodes 197. Farn 376.

The genl rule that a lim: after a genl failure of issue to can have no effect in the state of Conn: for by our statute an estate is absolute in the immediate issue of the donee. Gory 419.9. Perpetuities

And further any limitation whatever of a future estate either by the way of remainder or devise tending to a perpetuity is void at its creation. No estate can be carried beyond the unborn children of a person in spec 1 P W 332. 2 Can 391. 2. 2 M 251. 4. 3 Bm 1632.

By a perpetuity is meant a perpetual succession of estates less than of inheritance keeping the fee always unalienable.

In some cases to effect a genl intent in devises Gb will construe such a devise as an estate tail according to the doctrine "as near as may be" but it can never be done in deeds. 2 F R 248 254.

suppose an estate devised to A for life remainder to his children for life. remainder to his grandchildren for life &c. these last remainders would be void as ex devises they would by Gb be construed into an estate tail & be good as an estate tail.

Where a contingent or other estate is devised over on a condition annexed to a preceding estate & the preceding estate fails the subsequent one will take effect. this holds of devises only. 2 Can 292. 4

Land to A for years remainder to his eldest son in tail if he will take the name of J. S. If not to B now if A's son will not take the name of J. S. B will take the estate 1 P 470. 3. 2 Can 163 344 415-18. See in G 45. 6. 1 H. 3. 2 C. 2. 1 W. 1. 134. 1 B. 1. 250.



Long  
Series

Suppose the same example is B's remainder vested or contingent? It is vested

If land is devised to A in tail & for want of his or his body to B & if A dies in the life time of the testator B's estate takes effect immediately in possession. for the limitation to A is lapsed by his death before the testator Doug 333.6. Cro E 422. 2 Vern 722. Plow 340

But where a preceding estate is void from the remoteness of the contingency on which it is to take effect the subsequent estate is necessarily void 2 B.R. 251. 245. 2 H. Bl. 362. 1 Vesa 134. Feame 417. 18.

If a subsequent limitation is so framed as to depend on a prior one & the prior one never takes effect the subsequent one must fail. for here the subsequent limitation must be a contingent remainder & not an ex. devise for an ex. devise never depends on a preceding estate. 2 B.R. 251. 224

Land to A in tail remainder to B in fee if B lives to the age of 21. A dies after the death of the testator before B is 21 years of age B's remainder is gone. if A dies without issue. But if A had died before the testator B might have an immediate estate.



*Nested Remainders*  
are descendible.

If a devisee of a vested remainder dies  
the remainder goes to the heirs of the devisee

are transmissible to heirs or to  
executors

are assignable it may be assigned  
by common law conveyances.

are devisable

2 Moores 107. 213

At this day the same rules hold as  
to contingent remainders &c except that  
they cannot be assigned at law tho they  
may be in equity.

A possibility clothed with a present  
incl is the term used in the law for contingent remainders &c

Francis 336: 91 439: 40. Talb 117. 1 Bl & 422  
005. 1 H Bl 30. 4 TR 248. 1 Fm l 202: 3. 209. 3 TR 88  
43. 458 note. Pow on Dec 234. 447. 1 Ves 46.

1 Br 69 131. 2 new & 383. 2 Moores 247. 2 H: 121-114

Upon land is granted or devised to  
A for life remainder to B in fee or contingent  
& B dies before the contingency happens leaving  
a son. B's son or heir at law will take it  
when the contingency happens. or he may  
devise it before the contingency happens when  
the contingency happens the devisee will have  
the estate.

Contingent  
interests

Such a contingent int<sup>d</sup> does not of course rest in the person who is heir at the remainder man's death but to the person who is heir at the time when the contingent happens

Land is limited to A for a life remainder to B in fee on a contingent B dies before the con<sup>d</sup> happens leaving 2 sons by diff wives the eldest son dies without issue before the con<sup>d</sup> happens the second son by the second wife will have the estate when the contingent happens to the exclusion of the gent heirs of the first son

Contingent remainders & a devise cannot be transferred by law by deed &c. as soon as they become vested ~~then~~ by law they are transferable

1 Pow on Con 150. Hob 130. 2 Bl. & q. Shep Touch 238. 932. 2 Wood 157. 212.

But these contingent int<sup>s</sup> may be virtually transferred at law when they are recovered by fine or recovery suffered by the remainder man or the devisee of the ex-devisee. 2 Wood 212. 238. 16:7 Bro Lee 593. 2 Bl. 355. 5. 561:2

The principle on which they can thus be passed is that of estoppel. i.e. the person suffers the recovery & his heirs are estopped from pleading that they had no present int<sup>d</sup> when they suffered the recovery

so these interests may be passed by deed by way of estoppel 2 Cruise 439.

Contingt insts may at law be released but a release is not a transfer (1 Vissey 411 11 Alton 152 2 Woodes 213) It is in nature of an abandonment or a river, the release must be to the present owner of the land — But an apportionment or sale or direct transfer of such insts is allowable only in Chancery even there the agreement is considered merely an agreement hereafter to grant — is an executory agreement.

Such apportionment of these insts will not in equity be enforced unless it is made for a valuable consideration or at <sup>least</sup> for a valuable consideration in the second degree for bts of equity never enforce voluntary agreements 2 Vozz 453 11 Earne 440-2 2 Woodes 213. 9 Allod 101 2 P. M. 608.

The reason why equity considers these agreements as executory agree: is that they have extraordinary power over executory agree: & more over executed agreements as such.

Events happening after the <sup>making</sup> execution of a devise & before its consummation may vary the limitation from a contingt remainder to an absolute but events happening after its consummation i.e. after the devisors death cannot in genl have this effect Talb 44 11 Earne 401 419 11 Doug 325. 6. 476. note 1 11 For then the will has gone into operation from the moment of the testators death it ceases to be ambulatory.

But events happening after the testators death may change the character of the limitation if there is a double contingt including a provision for such events because this change is provided for by the limitation itself. This double contingt is genlly called a contingt with a double aspect see 2 Vis 249. 249. 11 Doug 470. 11 Earne 420 2 P. M. 608.

Indeed the limitation is not here changed such a double contingency may however be implied.



Ex:ay  
Devisey &c,

If a prior limitation is an ex: devise  
those who follow it must of course be ex: devises  
and cannot be contingent remainders

for if the prior limitation is an ex:  
devise viz a freehold created without any part  
estate, in future those who depend upon it  
must be of the same character. for they must be  
either substitutes for the former or to take effect after  
it. & in either case the latter will be with  
any freehold having at the time

Suppose land limited to A in tail to  
take effect on A's marriage remainder to B  
in fee now when A takes his estate in possession  
B's remainder takes effect in trust Day 14/58

But it is not always true that a  
subseq<sup>t</sup> limitation takes effect in trust when the  
prior one takes effect in possession

Thus land to A in tail when  
he is 21 & <sup>remainder</sup> to B in fee on the day of his marriage  
now both these are ex: devises now when A is  
21 & his estate vests in possession if B is not  
married B's estate is not vested in trust  
even tho' A's estate has taken effect in possession



The last species of expectancy is a Reversion - an estate in reversion is the residue of an estate left in the grantor <sup>to commence by possession</sup> after the expiration of a smaller estate granted by himself.

Co. Litt 206. 2 Bl 175. 2 Woodes 172.

The reversion rests in the grantor by operation of law without any express reservation what he does not part with him of course remains in him (24) 3 Lev 406:7 2 Woodes 172:3

A reversion can be created only by operation of law while a remainder can only be created by act of the parties by some species of conveyance - 2 Bl 175 Co. Litt 224. Hob 30. 2 Woodes 173.

But a reversion is a vested & present int & may be transferred as well at law as in equity - like a vested remainder, 2 Bl 175.

But this conveyance cannot take effect in possession until the first estate is determined 2 Bl 175.

All reversions are now vested by the ancient common law there might be a contingent reversion, i.e. a reversion expectant on a base fee being determined but base fees are now out of use 2 Bl 109.

Some of reversions may sometimes be made for years or for life, but these are now out of use.

## Reversion

A reversion cannot be created by parties hence if A having a fee simple grants an estate for life to B remainder to himself & heirs this limitation of a remainder to himself is of no effect

If he grants an estate to B for life with reversion to C & his heirs C does not take a reversion but takes a remainder. for a reversion cannot be created by act of the parties -

And if rent is reserved out of a particular estate it accrues of course to the grantor for it is incident to a reversion

2 Bl 270. 2 Wood 173. 3 Leo 467 Bro & Sop. & in the case last stated C w<sup>d</sup> not have the rent for he has a remainder only,

A gen<sup>l</sup> grant of reversion where rent is reserved of course carries rent with it for whoever has the reversion of course has the rent. the <sup>incident</sup> follows the principal except exceptions: Co Litt 143. 2 Bl 174. 176.

Rent tho incident to the reversion is not inseparably so they may by a special clause be separated. The reversion may then be granted without the rent or the rent be granted without the reversion. a gen<sup>l</sup> grant as before said however of the reversion always carries the rent with it.

By a gen<sup>l</sup> grant of the rent however the reversion does not go with it Co Litt 151. 2. 2 Bl 176. The principal draws after it the incident but the incident does not draw after it the principal,

It is a good rule of com. law that Reversions if one makes a lease he cannot grant away the reversion before the lease enters on his lease the rule is founded on the feudal doctrine of attornment. Reversions cannot be granted until attornment. - By attornment is meant an acceptance of a new landlord on the part of the tenant.

4 & 5 Ann & 11th Decr have taken away the necessity of attornment, attornment never existed in this state -

Litt's 567. 2 Litt 55. 67. Co Litt 46 b 315 b. 2 Woodd 173:4. 2 Bl 72. 288. 290. This rule must follow the fate of the attornment -

A reversion may be granted by the word "land" without more. Ex. If the grant is of such a tract of land & the grantor has only a reversionary int in it the reversion passes but it is only in such cases that reversion will pass under that name. 2 Woodd 174. 10 Co 107. Plow 433

An estate in prop might at common law be granted without writing by mere livery of seign. But a reversion could never be granted except by deed & attornment or by fine, for livery of seign could not be made of a reversion.

On the same principle that an incorporeal hereditament could not be transferred without deed. - The rule however requiring deed 2 Woodd 174 & attornment, &c applies only to freehold. As C 143 reversions - at C & a reversion for years Park 561. might be granted by parol, since now Litt 5567 by stat of frauds -



## Reversions

But a vested reversion for years may be passed at com: law without deed for it is a chattel int<sup>ty</sup> Litt 55. 67. See Com 143 2 Woodes 174 (u) - It might be granted by parol. vide last rule -

As the whole reversion may be granted away so it may be divided & various particular estates may be carved out of one reversion in fee & the ultimate reversion still remaining in the grantor. - 2 Woodes 174. 5.

There may be a reversion of a chattel real as of a freehold int<sup>ty</sup>  
As if a lease for 100 yrs makes a lease for 50 yrs he has a reversionary int<sup>ty</sup> in the remaining 50 yrs  
3 Lev 154. 5 2 Woodes 175

The reversion expectant on the determination of a fee tail is so remote an int<sup>ty</sup> that in contemplation of law it is of no value & therefore before it takes effect in possession it is not considered as a part.

If therefore the heir at law of a reversion expectant on a determ: of an estate tail is sued on a contract of his ancestor if he has nothing but this reversion he may plead **no assents** from his ancestor

Powell on Mort 433 3 P. W. 255

One reason is that the reversion is in the power of test in tail,



Merge

When a greater & a less estate  
meet in the same person in one & the same  
<sup>right</sup>~~person~~ without any intervening estate the  
less estate is merged in the greater.  
Bro & 302, 3 Co 60:1 3 Lev 437 2 Bl 177  
To avoid the absurdity of a man's being  
lord & tenant to himself—

But to produce this effect the greater  
& less estate must meet not only in the same  
person but in the same right or capacity

Thus suppose A has the reversion in  
his own right & the estate for years in him  
as executor for D. here is no merger for if  
there were the representatives of D would be injured  
& the creditors also—

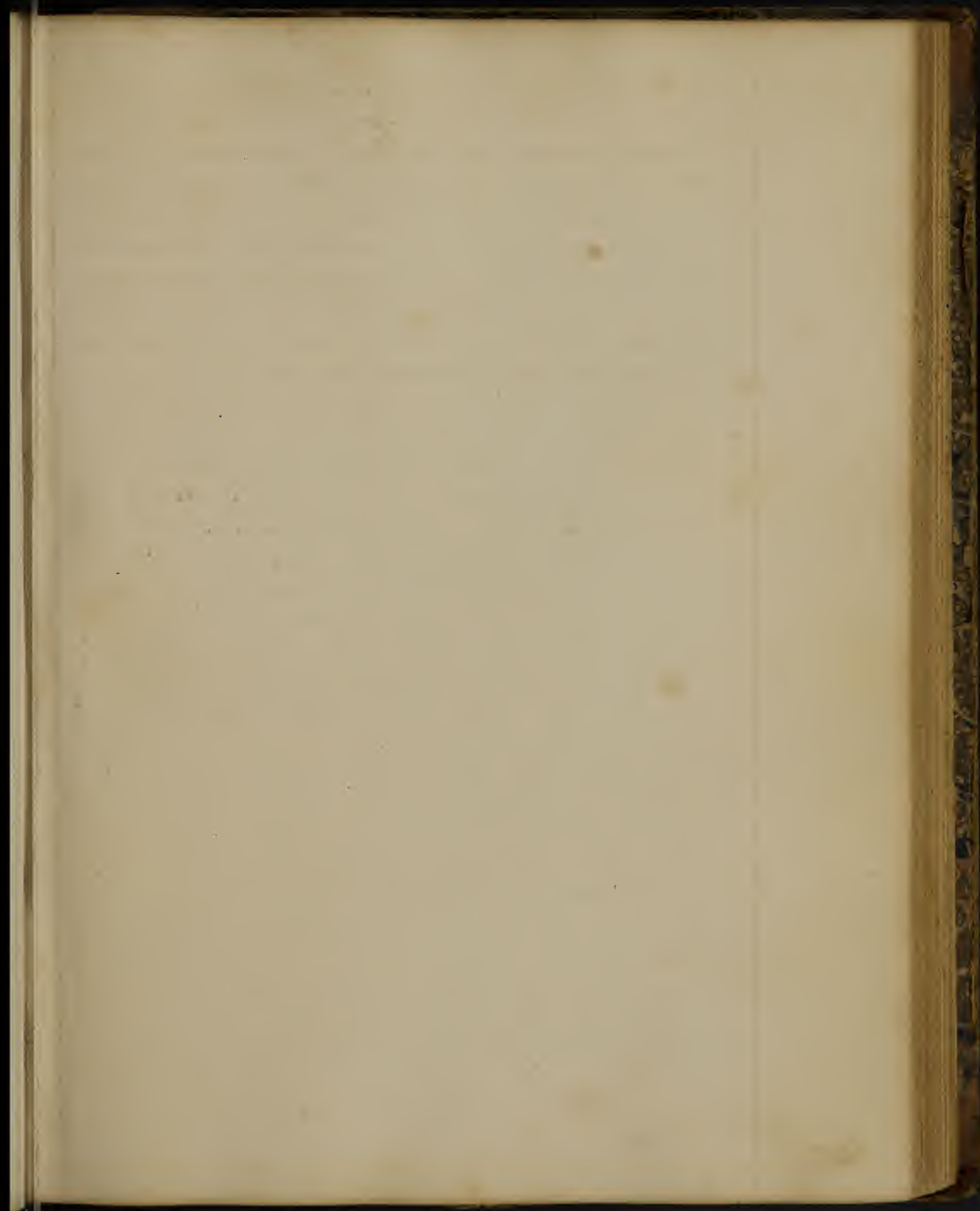
Suppose a feme sole has an estate for  
years & B the reversion of the same estate &  
B marries A. There is no merger for if there  
were the creditors of the feme sole might be injured—  
Co Litt 338. Bro Jac 275

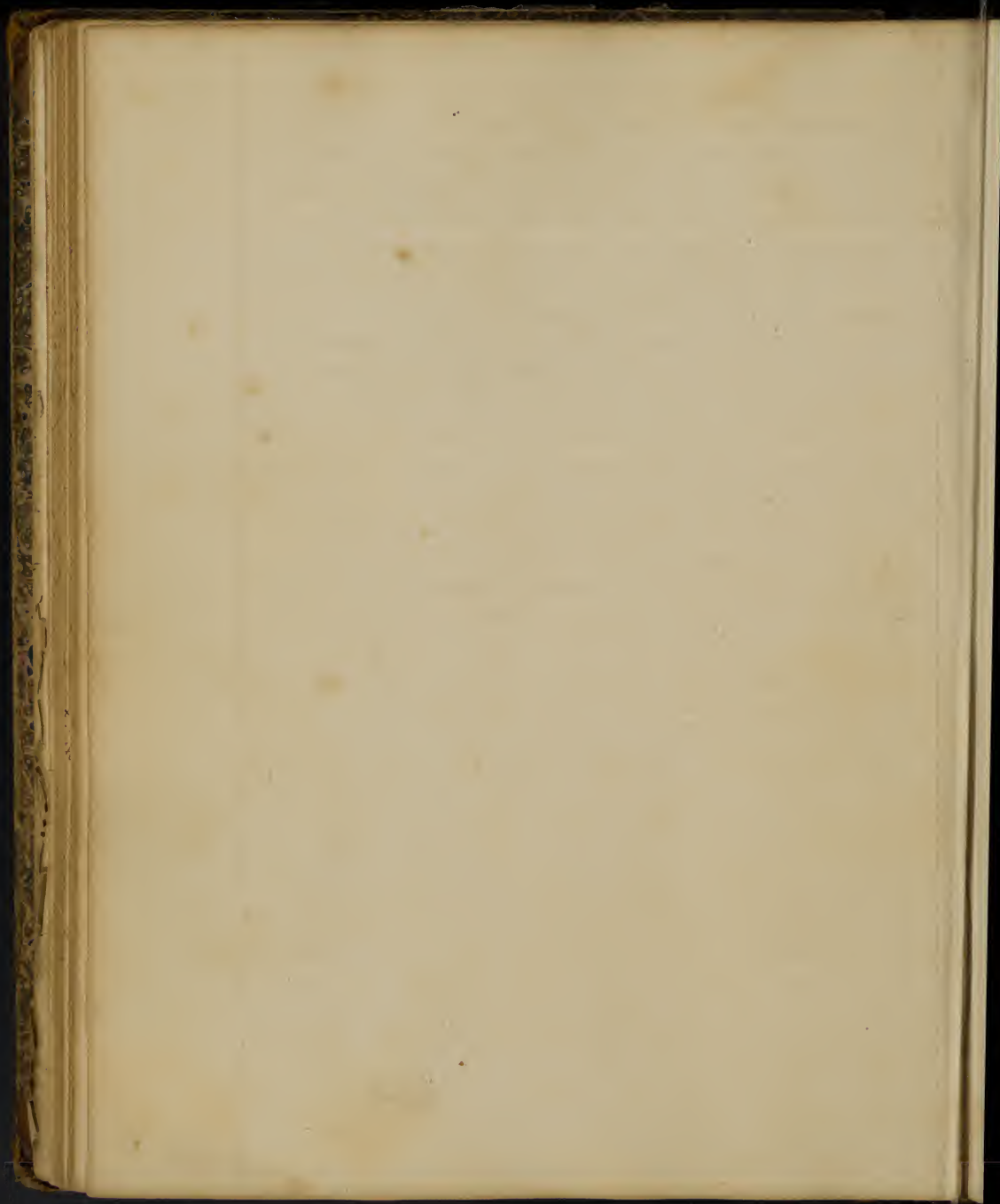
Flow 415. 2 Bl 177.—

*But suppose A has a life estate & B has the reversion in  
his own right & B marries A. There is no merger for if there  
were the creditors of A might be injured—*

There is one exception to the general rule  
of merger when the greater & less estate meet in  
the same person & in one & the same character or  
right - viz the case of a tenant in tail  
who purchases the reversion in fee, here  
is no merger for to allow a merger in  
such a case the issue might be injured.

2 Co. 61. 5 Bl. 74. 2 Bl. 177. 8. Bro & 302  
& besides tenant in tail never surrenders  
his estate to the reversioner & merger  
is nothing but a virtual surrender,







## Real Property

### Estate upon condition (150)

are such as depend upon some uncertain event by which they may be enlarged enlarged, or defeated or created, when the estate is to be created the event is precedent - conditions are implied & express under the latter of which is classed estates upon pledge. 2 Bl 152. Co Litt 201

Estate upon condition implied are those to which some condition is annexed by law to that kind of estate from the open & nature of the estate - An alienation in fee for example by a tenant for life is an implied condition broken (Co Litt 215. Litt 2378. 2 Bl 152:3) by which his estate is forfeited, These implied conditions are always cond<sup>ns</sup> subseq<sup>t</sup>. An express condition is one in terms. An estate upon an express condition is one to which some condition is annexed whereby the estate will be created enlarged &c & by operation is expressed in the gift Co Litt 201. 2 Bl 154. 154

Conditions of this kind are either precedent or subseq<sup>t</sup>. the first are such as must be performed before the estate can rest at all or be enlarged at all.

Subseq<sup>t</sup> conditions are those by which an estate already vested may be determined, or defeated as an estate to a person for a certain term with a condition that if the rent is not punctually paid the grantor may enter & defeat the estate. Litt 5325 Co Litt 154 217. 2 Bl 154. -

Estates on      To this latter class may be referred base fees  
Condition      & fees conditional at common law.

An estate on subsequent condition,  
that unless the rent be paid on a certain  
day the estate shall fail. The grantor cannot  
enter unless he has demanded rent.

7 R 117 Co Litt 201. 7 Co 25.  
5 B 40 Bro C 73. 528. For such conditions are in  
nature of a penalty & are not favoured.

There is a distinction between an  
express condition in deed & a limitation  
which is called a condition in law.

The expressions "so long as", "while",  
"until" &c are words of limitation & not of  
condition these are words of duration.

The expressions "upon condition", "so that",  
"provided" &c are words of condition in deed  
& not words of limitation.

Litt 380. 10 Co 41. Litt 535. 3 R 41. 2 B 155

If the qualification annexed is a limit  
ation then on the contingency's happening the  
estate ceases immediately & of course without  
any act on the part of the person entitled  
to the estate. i.e. of him next in expectancy,

But if an estate is limited on a  
condition in deed the law permits the estate  
to endure beyond the happening of the  
contingency until the grantor or his representatives  
take advantage of the happening of the (Litts 347 2 B 155)  
contingency by entry &c—

There is a single exception to the latter Estates on  
rule. The words of strict condition are condition  
used still if upon breach of this condition  
the estate is limited over to a third person  
this condition in deed is construed as a  
limitation. For if this qualification was  
considered a strict condition the limitation  
over might (have <sup>to</sup> been) completely defeated  
if the grantor or his hrs failed to make  
entry for breach of the condition for no  
one can take advantage of a breach of the  
condition except the grantor & his hrs or  
executors. 1 Hen 202. Bro & 205 2 Bl 155

If a lease contains a clause that the lessee may, enter for breach of payment an actual entry is not necessary to entitle the lessee to an action of ejectment. This holds only if eject<sup>t</sup> owing to the fiction in this action of ejectment by which entry is confessed - Doug 460 1st Raym 750 Yalk 259

It is now well settled tho' formerly  
doubted that an express condition in a  
lease for a term of years that the lessee should  
not assign is a good condition.  
25 R 135- 356 604. 60 & 61. 2 Bl R 766  
2 Wk 219.

Le'it "Covenant broken"  
And a cond<sup>n</sup> that neither leper nor his Eyes  
shall assign binds the w'rs. LOR 138-140. 425.



States on      A condition in a lease that if the  
condition      lessee becomes bankrupt the lessee shall enter  
is good.

And also a condition that the term  
for years shall not be taken for the lessee's  
debts is good. (H) 65 R 684. 27 R 133.  
27 R 219.

If a person holding a term for years  
or an estate for life on condition that he shall  
not assign if the lessee attempts to assign &  
the deed is ill for want of requisites the attempt  
does not forfeit the estate 7 R 641. For if the deed of  
assignment is utterly void there is in law no  
assignment. If a condition subject express is  
impossible at its creation the condition is void but  
the estate is absolute. For the condition being  
impossible at its creation is ab initio void  
& therefore cannot defeat a vested estate. It can  
not have any legal effect.

For example, a condition that one  
shall marry a person already dead this being  
impossible is void & the estate is absolute.

The rule is the same if the cond.  
should become impossible by the act of God  
or of the grantor.

Thus A grants an estate to B that  
unless he shall within a year marry C if C  
dies within the year the condition is ~~not~~  
is impossible & therefore the estate absolute.

The case would be the same if A  
should during the year marry C & thus render  
it impossible for C to be married by B.



If the condition subseq<sup>t</sup> is ag<sup>t</sup> law or estate on  
repugnant to the nature of the estate the condition  
grant operates precisely as if there were no  
such condition 25 R 157. The condition  
being void the estate is absolute,

In the first of these cases the cond<sup>n</sup>  
is void because illegal. In the second case the  
condition is void for the grant & cond<sup>n</sup> being  
inconsistent the grant shall govern,

If an unlawful or impossible condition  
precedent be inserted in the grant no estate is  
created for the condition being void the  
estate limited upon it is void —

The performance of an unlawful  
act can never <sup>create</sup> acquire a right. If the int<sup>y</sup> were  
already vested indeed a void condition cannot  
defeat it —

See Litt 206. 25 R 157.

The performance of a condition is  
matter of fact provable by payable evidence  
the stat<sup>e</sup> of fraud notwithstanding

Powl (on Con) a collat 547-6.

Barnard 90. A payment of the mortgage  
debt may be proved by parol —

Under estates on condition subseq<sup>t</sup>  
full estates held in pledge.

## Mortgages

Estate held in pledge or of 2 kinds  
II. Vivum radium an estate granted to  
be holden by the creditor till the profits of  
the estate shall satisfy the debt.

And when the debt is satisfied the  
estate results back to the grantor or debtor

This kind is out of use

Co Litt 205. Powell on Mort 3 & 4. 2 Bl 157

## Mortgages.

III. An estate in pledge of the 2<sup>d</sup> kind is  
mortuum radium or mortgage.

A mortgage is an estate granted by  
a debtor to his creditor on condition that if  
the grantor & his representatives shall pay  
the debt according to the covenant he  
may redeem or the grant shall become  
void. <sup>or the mortgagor shall reconvey the estate to the mortgagee</sup>  
Co Litt 205. 2 Bl 157. 8. Powell on Mort 3 & 4.  
Litt 5332.

This definition does not comprehend  
all cases for a conditional grant made  
as an indemnity to the grantee where there  
is no existing debt is clearly a mortgage  
as an indemnity to an endorser or  
an indemnity to a surety.

As for future advances, 7 Com. 387

When the grantor pays the debt  
according to the condition the estate reverts  
in the grantor without any act by the  
grantee yet it is more safe to take a release  
from the mortgage to the mortgagee because  
otherwise the payment of the debt which is a matter  
to be proved by parole evidence might be forgotten or  
it might by death of witnesses become impossible to prove it.

And a Ct of equity will compel the mortgagor to release on payment of the debt for it is considered unreasonable that the mortgagee should withhold the release & force the mortgagor to depend upon parole evidence for proof of the payment of the debt - or if he pleases the mortgagor may compel a reconveyance -

If the mortgagor fails to pay the debt according to the condition his estate at law is gone forever. Ct of law construes the condition according to the letter.

But Ct of Equity will allow the mortgagor to redeem after forfeiture at law.

(part) - 2 BL 150 Powell on M. & H.  
13. 185. Ors 6447:4. 450.

Thursday Dec 16<sup>th</sup> 1824.

The term mortgage in its original sense means the estate pledged but the term is frequently used to denote the mortgage deed.

The condition of a mortgage deed is a defeasance intended to defeat the estate if the condition is performed.

The condition may be incorporated in the deed, annexed to it, inclosed on it or separated from it & the effect is the same which ever of these courses is taken. - 2 BL 150

The mortgage debt must be described in the condition 7 Cranch 80:1. with suff: certainty to enable subsequent creditors & purchasers to ascertain either in the condition or by inquiry elsewhere 7 Conn: 387 the extent of the incumbrance 9 Conn: 286. 3 Conn: 146



## Mortgages,

If the condition is separate from the mortgage deed the deed is in itself absolute but the condition if it refers in terms to the deed is taken with the deed & the two instruments taken together make a mortgage. Powson Mat 5

Reading 77 (m)  
Weston 144  
4 Kent 144.  
If therefore the grantor of an estate gives back to the grantor a <sup>contract</sup> condition that if the grantor pays a sum of money the grantee will reconvey, without reference to any deed given then the deed & the <sup>contract</sup> condition do not make a mortgage, tho' a Ct of Eq<sup>y</sup> will enforce a specific performance. Bouch & Garland 1809. Bon. Day Rep

Pow 14:16:77. 8  
As the condition is subsequent it follows that on delivery of the mortgage deed the mortgage is immediately vested with the estate defeasible indeed on pay of the condition. But the gen<sup>l</sup> usage is for the mortgagor to remain in possession at least till the day of payment, (5 Bl 158) - It has been contended in this country that the mortgage is not entitled to immediate possession or what principally I. S. cannot conceive -

A material difference between a grant to secure a gift or gratuity & one made to secure an existing debt or duty.

In the first place tender of the money according to the condition discharges the whole obligation but in the latter case tender of the debt only discharges the mortgagor in on the estate & reverts it in the mortgagor but does not of course discharge the debt & release from the mortgage of the estate also does not discharge the debt 60 Litt 207 a 209 a & b. 9 Co 77. Pow on ell 654. Os 1215. Litt 5 335-8



The reason is where the deed is to secure mortgages a gift & the lien on the estate is gone nothing is left, there is no debt to be recovered but in the latter case altho' by tender & refusal the mortgagor became entitled to possession of the land & the debt being a duty distinct from the condition still remains. — Of late Ct of E have acquired a complete jurisdiction over mortgages & as they interpose in favour of mortgages so also they do in favour of the mortgagor.

How mortgages are regarded in equity is an important inquiry.

the Com. law Ct construes the condition strictly, on non payment at the day the estate was vested absolutely in the mortgagor. Ct of equity considers the transaction 2 Cr 90:1. as a mere personal contract for the payment of ~~a debt~~ <sup>money</sup> & the mortgage is a security for the performance of the contract & the mortgagor as the actual owner of the land even after a failure to pay according to the condition.

The jurisdiction of mort. is confined now almost entirely to equity & in Eq. the debt is regarded as the principal & the mortgage the incident & it follows that whenever the debt is paid the inst of the mortgage is gone & he becomes trustee for the mortgagor.

Powson 14:15 164:70 1 Ver 575

Powson Dec 615 2 Cr 90:1.

Mortgages.

2 Cr 91.

After the breach of the condition & when the debt is paid ~~after the breach~~ when the debt is paid, the mortgage is trustee for the mortgagor. For at law the mortgagee tho' paid has the legal title to the estate but eq: regards the mortgagor as having all the beneficial or equitable int: in the mortgage. & this is the precise description of a trust estate.

And a b<sup>t</sup> of eq: on a bill filed for that purpose will compel the mortgagee or trustee to reconvey the estate to the mortgagor —

The right of the mortgagor to redeem after foreclosure is called an eq: of redemption & it commences immediately on the foreclosure of the legal estate. For before foreclosure there is a legal right to redeem & of course no eq: of redemption. 9 Alod 196. Pow: on all 156. 299.

But notwithstanding this eq: of redemption, the legal title of the mortgagee still continues so far as to enable him to take possession of the estate & hold the profits till his debt is paid — & this right he has even in Equity. 9 Alod 196. Pow: on all 15.





Mortgages.  
Agreement  
restraining  
the Eq. of Red.

Ex gra if at the time of making, the mortgage it is stipulated that if the mortgaga fails to pay at a certain time the conveyance shall be deemed a sale this stipulation is utterly void

"Once a mortgage always a mortgage"  
The object of the rule is to protect the mortgaga from the oppression of the mortgagee.

And it makes no difference whether the agreement intended to impair the right of redemption is in the same deed or on a separate deed, in a distinct instrument,

2 Crin 93. 2 Vern 84. Comyn R 603  
Powell on M 22.

4 Kent 143

Or even if the agreement is that the conveyance shall become absolute if the mortgaga fails to pay on the day provided the mortgage will pay an additional sum of money this is void in equity.  
1 Vern 488, 138. 2 Do 520. Powell on M 23-26. 2 Crin 94. This supposes the agreement contemporaneous with the mortgage.

4 Kent 143. But an agreement that if the mortgaga should elect thereafter to sell his eq. of redemption the mortgage shall have the privilege of preemption is good even tho made at the time of the mortgage. 2 Eq. ca. 599  
Pow on M 26-7. This does not afford the mortgagee the means of oppression — This maxim Once a mortgage always a mortgage contemplates some collateral agreement made at the time of executing the mortgage —



But these rules do not impair subseqt Mortgages.  
agreements

A subseqt agree: for the sale of the  
eq: of redemption, or an absolute sale of the 41 Kent 1143.  
mortgaged estate is good, <sup>provided the contract is not</sup> for the time of  
the mortgage is deemed the time of the  
mortgage as necessity. 1 Vern 268. Talb 61

2 Eq. ca. 595. 6. Powell on s. 28. 119. 2 Cr 96. Indeed  
this right is highly beneficial to the mortgagor.

And there is one class of exceptions to  
the rule "Once a mortgage always so"

This is the case of a family settlement  
when the contract is between members of the same  
family & where a benefit or gratuity is intended in  
a certain event to the mortgagor & in this case  
an agreement that in a certain event the estate  
shall become irredeemable will be good & a C  
of Eq will not enforce a redemption.

The reason is that this case does  
not come within the principle of the rules &  
maxims above stated. For in this case there is  
no danger of oppression or imposition on the  
mortgagor, 2 Vern 364. 1 Vern 7. 2nd. 232. 193.  
2 Eq. ca. 595. Powell 31.3.

An agreement that on non payment at  
the day the mortgagor may sell the property.  
& hold the surplus for the mortgagor is  
good - 2 Cr 104. 5. <sup>where the mortgage</sup>

is a security for the purchase money of the property  
& the

## Mortgages

A deed absolute by its terms cannot be qualified by a parole condition. this is inadmissible even at common law without reference to the St of frauds— for at C L a deed cannot be altered by parole.

But it is laid down that an absolute deed may <sup>be</sup> construed & treated as a mortgage when the fact <sup>that</sup> there was a condition is inferable from facts which are notorious & where there is no danger of perjury. It was once decided so in Court but afterwards reversed by our senate whk was then the supreme Ct of errors. But the rule is laid down by respectable authorities.

Maddecks  
Chy 518. &  
notis.

2 John C 182

15 John R 555

6 John C 457

7 John C 45

4 do 187

1 Van 108.

2 Fenn 280.

Pow on ell 65. Fall 60. 3 Woodes 429.  
Pree ju by 526. 2 Atk 71. 2 Fmb 267. (Sanford &  
Washburn Comm.)

These rules must be considered as mere dicta. It must be admitted that a strong objection to this rule arises from the St of frauds— & the common law

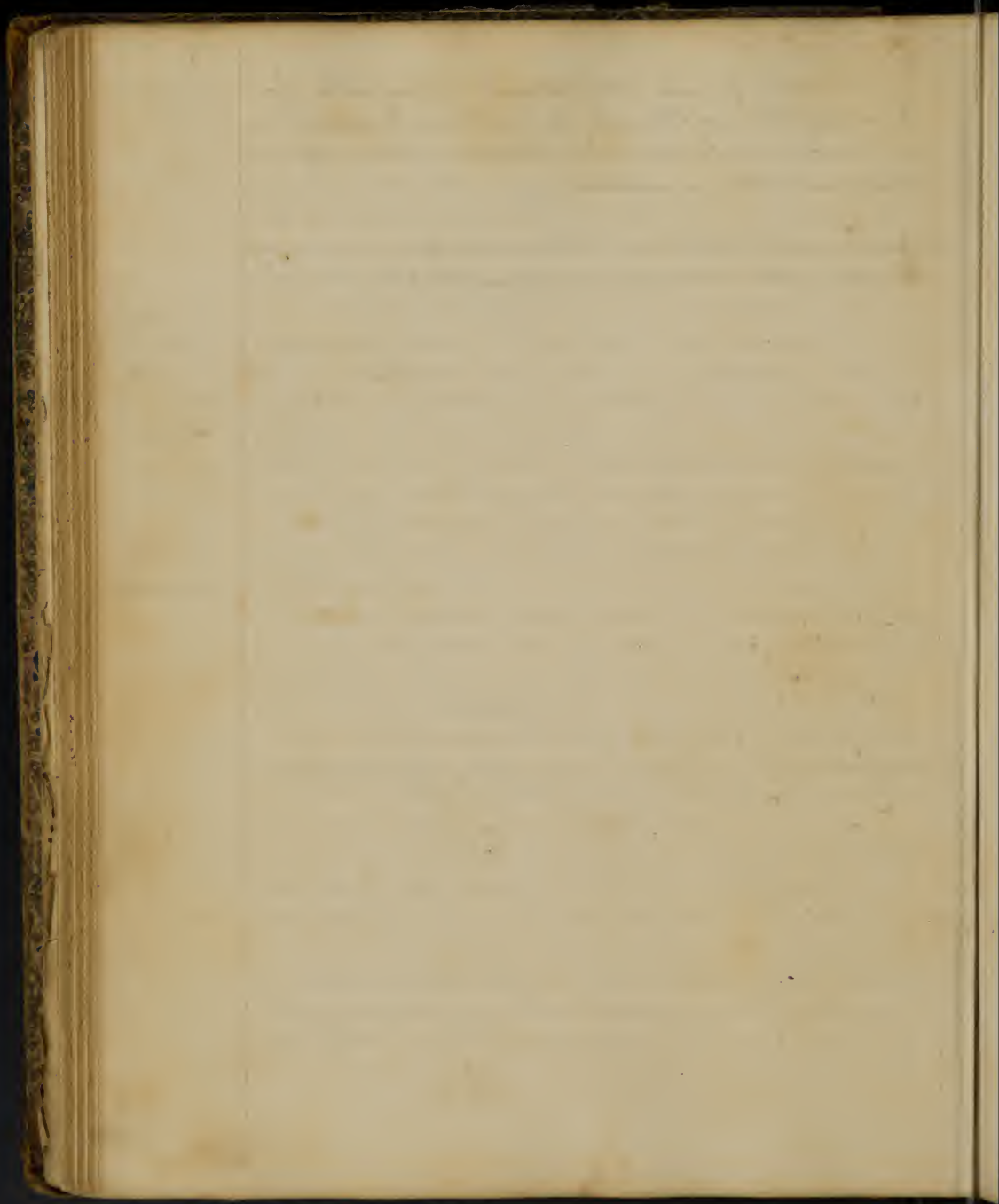
rules— Kent C 142. <sup>admirable to show that an absolute deed was intended as a mortgage & that the defeasance is destroyed by fraud or mistake</sup> ~~is~~ <sup>is</sup> ~~admirable to show that an absolute deed was intended as a mortgage & that the defeasance is destroyed by fraud or mistake <sup>part of the mortgage debt</sup> may be proved by parole evidence &~~

If the mortgage forgives the debt the debt by parole the fact may be proved by parole evidence

In case A made a mortgage to B & B on the death bed said to A I freely forgive you this debt parole evidence of this fact was admitted. Pow on ell 553. 6 Barnard 90.

This parole evidence is admissible for  
it is in the nature of a fact in pais. It  
is an act which cannot in the nature of  
things consist in writing, -

Vendor of real estate has a lien for the purchase money  
somewhat in the nature of a mortgage. 4 Kent C 151. 2. 3 &c





Real Property (Decr 17<sup>th</sup> 1824 Nov.)  
Mortgages

The use of the mortgage in the estate mortgaged — The mortgage was upon the delivery of the title deed the legal possession, but if there is an agreement that the mortgagor shall continue in possession for a fixed term the mortgage is considered tenant for years, but the agreement is merely that the mortgagor shall continue in possession without any express time he stint at will, Powel 66. 79 2 Bl 158 2 Cr 106.

(The very fact that the mortgagor continues in possession at all after the delivery of the deed is evidence presumptive that there is an agreement that he shall continue in possession till the day of payment. (so decided in New Jersey U.S. court.)) \* If the mortgagor continues in possession without any express agreement he is considered at law quasi tenant at will so far as respects the right of possession —

2 Cr 106 — Cro Jac 659. Doug 21:2 270 3 East 449  
Pow 66. 75. 84.

Indeed as to the right of possession he is viewed in a l<sup>t</sup> of equity as to the possession as quasi tenant at will for l<sup>t</sup> of equity do not interfere until after forfeiture at law & with regard to possession l<sup>t</sup> of law lead l<sup>t</sup> of equity. He may therefore be sued in ejectment by the mortgage & evicted without the 6 mos notice to quit allowed to tenants from year to year — Doug 22. Powel 68 3 East 449 2 Cr 107.  
Cro C 307-5

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\* This is the English rule and probably notwithstanding the decision in the circuit l<sup>t</sup> at New Jersey the rule will be adopted by our l<sup>t</sup> at present.

Interest of  
the Mortgagee not like other tenants at will construed into  
in possession - tenants from year to year.

In this state however the mortgagor  
may be sued in ejectment by the mortgagor  
without any notice at all to quit.

2 Conn Rep 1. 445 2 Cr 107.

Shander v  
Beecher.

3 East 449.

11 V. 67.

3 B. 421

This decision I think obviously wrong  
The mortgagor ought to have the notice to quit  
to which a tenant at will is entitled -

In New York the mortgagor is entitled  
to 6 mos notice to quit.

2 John 275 4 B 186 2 Cr 107.

But a mortgagee thus left in possession  
is not like other tenants at will entitled  
to emblements but he is not obliged to  
pay rents for he pays interest instead of rent.

The emblements however must be applied  
to pay the debt by the mortgagee.

Doug 25. Dow 67:8. 70.

An ordinary tenant at will cannot  
underlet the estate, but a mortgagee may  
make a lease to another & it is valid unless  
the mortgagor elects to defeat it. He may at  
his election treat the under tenant as a  
wrong doer or as a tenant to himself or he  
may permit him to remain tenant to the  
mortgagor.

Doug 22. Bro Jac 606 Bro 303-5  
Dow 68-4. 80 2 Cr 107:5. Such an under  
lease w<sup>o</sup> forfeit the estate of an ordinary  
tenant at will, -

But the undertenant of the mortgagor may be treated as a trespasser without any notice by the mortgagor, 3 East 449. Doug 22:3 49 John 215 2 St 54. Pow 74:5. 2 in 108:9. For the mortgagor in possession may consider the entry of the undertenant as a trespass. & sue him in ejectment without any notice — If the mortgage may as before said treat the undertenant to the mortgagor as tenant to himself & compel him to pay to himself all rent arrear & all accruing rent, on notice to that effect. but he cannot compel him to pay rent already paid to the mortgagor, before notice 1 Atk 606. Doug 266. Pow 65. 80:1. In effect the mortgagor can treat the undertenant as a trespasser (without notice) —

The mortgagor when sued in ejectment by the mortgagor cannot deny the mortgagor's title by showing the title in a third person.

If therefore A makes a mortgage to B. of land which belongs to C. A cannot plead to an action in ejectment that he owns the land. 17 L 760. 7 St 450. Pow 464. 2 Bl 295 308. He is stopped by his own deed,

On a similar principle if the mortgagor sues his undertenant in ejectment the undertenant cannot defend himself on the ground that the legal title is in the mortgagor. For here is something analogous to estoppel. (17 L 760. Pow 470. 1 Vern 258.)

For he has gone into possession under the mortgagor & enjoyed the benefit of the tenancy, & to create this quasi estoppel a deed or lease is not necessary.



of mortgage interest the mortgagor himself & ag<sup>t</sup> all strangers  
of the Dowry Cro 630-4. The "resp<sup>ts</sup>" & he has a  
mortgagor title whh will entitle him to redeem  
2 Cr 110.

As regards the mortgagor's ultimate  
possession or Dis<sup>t</sup> the mortgagor is regarded  
in eq. & for many purposes at law as the  
real owner of the estate & the mortgage  
right as regards the question of inst<sup>ts</sup>  
considered a chattel inst<sup>t</sup>

2 Bur 970. Doug 606:10

If then the mortgage is of a freehold  
inst<sup>t</sup> the realty is in the mortgagor & he  
by remaining in poss<sup>n</sup> may gain a  
settlement at law. He may also acquire  
a right of voting but a mortgagee in  
fa simple even in poss<sup>n</sup> does not acquire  
a settlement or right of voting.

If the mortgagor of a freehold dies  
his inst<sup>t</sup> passes under the denomination  
of land or real estate. His inst<sup>t</sup> may  
also be conveyed as real estate & requires  
all the solemnities of a conveyance of  
real estate

Doug 640 2 Vez 302

2 Bur 970. Dow 15. 76. 92 113. 124.

170. 2 P Wms 341. 1 Alk 605. 2 & 294 212 61.

rights of mortgagee pass to him in full



Still if the mortgage commits waste interest of the b<sup>d</sup> of eq<sup>y</sup> will grant an injunction in favour the mortgagee of the mortgage. for the mortgage may not lessen the security of the mortgage. — 3 Atk 729.

Pow 75.

But if mortgage in pop<sup>n</sup> fully lumber, never will not lie by mes<sup>s</sup> John 205 2 Am 118 (sup). — As to the int<sup>l</sup> of the mortgage

It is diff<sup>r</sup> at diff<sup>r</sup> stages

His int<sup>l</sup> between the time of receiving the deed & before the time of pay<sup>mt</sup> is before the estate is forfeited

His int<sup>l</sup> at this time is precisely the same as it was at common law before forfeiture before b<sup>d</sup> of eq<sup>y</sup> interfered.

The whole legal title is in him defeasible, on the mortgagee paying the debt on or before the day of pay<sup>mt</sup>. Of course the mortgagee may if he pleases take immediate possession & b<sup>d</sup> of equity do never interfere before forfeiture. 2 Vern 156. Pow 499. 50. 228. See in Chy 423. — Equity has no jurisdiction before forfeiture, before this there is a complete & adequate right of redemption at law & hence if between the time of delivering the deed & the day of pay<sup>mt</sup> before pay<sup>mt</sup> <sup>the mortgagee</sup> makes any conveyance or lease it is void as ag<sup>t</sup> the mortgagee, as the mortgagee has then no int<sup>l</sup> except this condition in his favour. — Doug 32. Pow 80.

During this period the mortgagee has no vested int<sup>l</sup> in the land at all but merely a contingent right to revert it in future. But during this time the mortgagee may pass his interest by way of estoppel, precisely as the owner of a contingent interest may convey his interest,

Mortgages. And hence if at first lease, land to  
Interest of B & then mortgages the same to C the  
the mortgage may still compel the prior lessee  
Mortgagee to pay the rent to himself because the  
mortgage has now the legal title to the  
reversion & rent is incident to the reversion  
and he may compel him to pay arrears  
but not rent due before the mortgage was  
made or the rent whl before notice he had  
paid to the mortgagee. (S)

When the lease of a term for years  
mortgages his, that the mortgage is in the nature  
of an apportion of the term provided the whole  
term is mortgaged. see fit "Covenant broken"

The rule formerly indeed was that  
the mortgagee was not liable for the covenants  
of the lease unless the mortgage took possession  
of the land. \* But the doctrine now is that  
the mortgage is liable upon the covenants of  
the lease even tho' he does not take possession.

Doug 435. 444

How 55. 58. 92. 2 Vern 275. 374.

1 Ves Jun 235. 3 Bro: Chy 166. 1 Ves 12

3 atk 512. Abbot on Sh 21. 2. 2 Cr 112. 3.

If the mortgagee does take possession  
he is by all the opinions liable upon all the  
covenants whl run with the land. 1 Br P 6105  
Pow. 921 So then is really an apportion - He then  
takes the profits.

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\* Is he liable if only part of the term is mortgaged  
to him. for instance if the reversion of a day or week is left  
in the mortgagee?

After the mortgage is forfeited by non-Interest:  
paid on the day appointed the mortgagee has <sup>of the</sup> in eqy only a chattel int & this is the case Mortgage  
even tho he has actually taken poss<sup>n</sup> in law  
indeed the right which the mortgagee has is absolute  
Doug 610. 694. 1 Atk 605. Powl 92

113. 170

The forfeiture of the mortgage makes  
then this diff at law that the mortgagee that  
then has the absolute title. But the law  
of equity is the law of mortgages.

After forfeiture the int of the  
mortgage will not pass in equity under the  
title of lands hereditaments &c. i.e. prima facie it  
will not so pass. — There is the qualification however.  
that if the mortgagee leaves all his lands &c  
having no other lands than those mortgaged  
the mortgage int will pass for the intention of the testator  
governs — 2 Vern 621. 1 Vern 32. 1 Nott 351  
Powl 170. 1. Cro C 447. 50. Powl 157.

The mortgage is considered in equity  
as having only a chattel int until a fore  
closure.

If he dies then after forfeiture & before  
foreclosure the mortgaged premises will go  
to the executors & not to the heir —

1 Vern 367. Powl 92 170



## Interest of the Mortgage

(See Note)

The assignment of the debt as of the bond &c carries with it the mortgage int in the land without any mention of the mortgage, and the principle that the accessory follows the principal

1 P.Wm. 458. Powd 453. 4 358. Rest 248, 428.

This is in equity only, & not in law for in law the assignment of the debt is nothing — The devise of the land mortgaged, by m<sup>ee</sup> carrying the debt Powd 623. The interest of the mortgage, hence, cannot be taken on execution, case in ellap: Powd 318. 19.

Because the mortgage's int is a chattel he cannot do any act of ownership which will encumber the estate of the mortgagor if therefore the mortgage passes the land for 20 or 50 years, he cannot plead this ag<sup>t</sup> the redemption of the mortgagor.

1 Eq. ca. 610. Powd 48.

It is said that where the security was defective & the mortgage would otherwise sustain a loss the lease might be good. But I think this doubtful — 1 Eq. ca. 610.

A mortgage even of a fee simple is not allowed to commit waste. 3 Atk 723

2 Vern 392. 592. Powd 94. A Ct of eq will in such case will grant an injunction to stay waste

If however the security is defective ie if the value of the land is small compared with the debt a Ct of eq will not interfere to prevent the mortgagee from felling timber &c. but the value of the timber thus felled must go to pay the debt. This matter is wholly in the discretion of the chancellor. Powd 95



And in all cases in which the mortgagee's <sup>Interest</sup> <sup>of the</sup> <sup>benefit of the mortgage</sup> waste the value is to be applied to the <sup>of the</sup> <sup>benefit of the mortgage</sup> first to the payment of interest & afterwards to sink the principal at 733. <sup>1</sup>

But the mortgagee cannot of right before foreclosure encumber or waste the estate to the injury of the mortgagee but he is allowed to charge the mortgagee all expenses which are necessary to keep the estate in repair & then expenses may be incurred in added to the principal at 518. 1 Wilson 34 2 Vern 584. <sup>1</sup> <sup>2</sup> <sup>3</sup> <sup>4</sup> <sup>5</sup> <sup>6</sup> <sup>7</sup> <sup>8</sup> <sup>9</sup> <sup>10</sup> <sup>11</sup> <sup>12</sup> <sup>13</sup> <sup>14</sup> <sup>15</sup> <sup>16</sup> <sup>17</sup> <sup>18</sup> <sup>19</sup> <sup>20</sup> <sup>21</sup> <sup>22</sup> <sup>23</sup> <sup>24</sup> <sup>25</sup> <sup>26</sup> <sup>27</sup> <sup>28</sup> <sup>29</sup> <sup>30</sup> <sup>31</sup> <sup>32</sup> <sup>33</sup> <sup>34</sup> <sup>35</sup> <sup>36</sup> <sup>37</sup> <sup>38</sup> <sup>39</sup> <sup>40</sup> <sup>41</sup> <sup>42</sup> <sup>43</sup> <sup>44</sup> <sup>45</sup> <sup>46</sup> <sup>47</sup> <sup>48</sup> <sup>49</sup> <sup>50</sup> 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<sup>715</sup> <sup>716</sup> <sup>717</sup> <sup>718</sup> <sup>719</sup> <sup>720</sup> <sup>721</sup> <sup>722</sup> <sup>723</sup> <sup>724</sup> <sup>725</sup> <sup>726</sup> <sup>727</sup> <sup>728</sup> <sup>729</sup> <sup>730</sup> <sup>731</sup> <sup>732</sup> <sup>733</sup> <sup>734</sup> <sup>735</sup> <sup>736</sup> <sup>737</sup> <sup>738</sup> <sup>739</sup> <sup>740</sup> <sup>741</sup> <sup>742</sup> <sup>743</sup> <sup>744</sup> <sup>745</sup> <sup>746</sup> <sup>747</sup> <sup>748</sup> <sup>749</sup> <sup>750</sup> <sup>751</sup> <sup>752</sup> <sup>753</sup> <sup>754</sup> <sup>755</sup> <sup>756</sup> <sup>757</sup> <sup>758</sup> <sup>759</sup> <sup>760</sup> <sup>761</sup> <sup>762</sup> <sup>763</sup> <sup>764</sup> <sup>765</sup> <sup>766</sup> <sup>767</sup> <sup>768</sup> <sup>769</sup> <sup>770</sup> <sup>771</sup> <sup>772</sup> <sup>773</sup> <sup>774</sup> <sup>775</sup> <sup>776</sup> <sup>777</sup> <sup>778</sup> <sup>779</sup> <sup>780</sup> <sup>781</sup> <sup>782</sup> <sup>783</sup> <sup>784</sup> <sup>785</sup> <sup>786</sup> <sup>787</sup> <sup>788</sup> <sup>789</sup> <sup>790</sup> <sup>791</sup> <sup>792</sup> <sup>793</sup> <sup>794</sup> <sup>795</sup> <sup>796</sup> <sup>797</sup> <sup>798</sup> <sup>799</sup> <sup>800</sup> <sup>801</sup> <sup>802</sup> <sup>803</sup> <sup>804</sup> <sup>805</sup> <sup>806</sup> <sup>807</sup> <sup>808</sup> <sup>809</sup> <sup>810</sup> <sup>811</sup> <sup>812</sup> <sup>813</sup> <sup>814</sup> <sup>815</sup> <sup>816</sup> <sup>817</sup> <sup>818</sup> <sup>819</sup> <sup>820</sup> <sup>821</sup> <sup>822</sup> <sup>823</sup> <sup>824</sup> <sup>825</sup> <sup>826</sup> <sup>827</sup> <sup>828</sup> <sup>829</sup> <sup>830</sup> <sup>831</sup> <sup>832</sup> <sup>833</sup> <sup>834</sup> <sup>835</sup> <sup>836</sup> <sup>837</sup> <sup>838</sup> <sup>839</sup> <sup>840</sup> <sup>841</sup> <sup>842</sup> <sup>843</sup> <sup>844</sup> <sup>845</sup> <sup>846</sup> <sup>847</sup> <sup>848</sup> <sup>849</sup> <sup>850</sup> <sup>851</sup> <sup>852</sup> <sup>853</sup> <sup>854</sup> <sup>855</sup> <sup>856</sup> <sup>857</sup> <sup>858</sup> <sup>859</sup> <sup>860</sup> <sup>861</sup> <sup>862</sup> <sup>863</sup> <sup>864</sup> <sup>865</sup> <sup>866</sup> <sup>867</sup> <sup>868</sup> <sup>869</sup> <sup>870</sup> <sup>871</sup> <sup>872</sup> <sup>873</sup> <sup>874</sup> <sup>875</sup> <sup>876</sup> <sup>877</sup> <sup>878</sup> <sup>879</sup> <sup>880</sup> <sup>881</sup> <sup>882</sup> <sup>883</sup> <sup>884</sup> <sup>885</sup> <sup>886</sup> <sup>887</sup> <sup>888</sup> <sup>889</sup> <sup>890</sup> <sup>891</sup> <sup>892</sup> <sup>893</sup> <sup>894</sup> <sup>895</sup> <sup>896</sup> <sup>897</sup> <sup>898</sup> <sup>899</sup> <sup>900</sup> <sup>901</sup> <sup>902</sup> <sup>903</sup> <sup>904</sup> <sup>905</sup> <sup>906</sup> <sup>907</sup> <sup>908</sup> <sup>909</sup> <sup>910</sup> <sup>911</sup> <sup>912</sup> <sup>913</sup> <sup>914</sup> <sup>915</sup> <sup>916</sup> <sup>917</sup> <sup>918</sup> <sup>919</sup> <sup>920</sup> <sup>921</sup> <sup>922</sup> <sup>923</sup> <sup>924</sup> <sup>925</sup> <sup>926</sup> <sup>927</sup> <sup>928</sup> <sup>929</sup> <sup>930</sup> <sup>931</sup> <sup>932</sup> <sup>933</sup> <sup>934</sup> <sup>935</sup> <sup>936</sup> <sup>937</sup> <sup>938</sup> <sup>939</sup> <sup>940</sup> <sup>941</sup> <sup>942</sup> <sup>943</sup> <sup>944</sup> <sup>945</sup> <sup>946</sup> <sup>947</sup> <sup>948</sup> <sup>949</sup> <sup>950</sup> <sup>951</sup> <sup>952</sup> <sup>953</sup> <sup>954</sup> <sup>955</sup> <sup>956</sup> <sup>957</sup> <sup>958</sup> <sup>959</sup> <sup>960</sup> <sup>961</sup> <sup>962</sup> <sup>963</sup> <sup>964</sup> <sup>965</sup> <sup>966</sup> <sup>967</sup> <sup>968</sup> <sup>969</sup> <sup>970</sup> <sup>971</sup> <sup>972</sup> <sup>973</sup> <sup>974</sup> <sup>975</sup> <sup>976</sup> <sup>977</sup> <sup>978</sup> <sup>979</sup> <sup>980</sup> <sup>981</sup> <sup>982</sup> <sup>983</sup> <sup>984</sup> <sup>985</sup> <sup>986</sup> <sup>987</sup> <sup>988</sup> <sup>989</sup> <sup>990</sup> <sup>991</sup> <sup>992</sup> <sup>993</sup> <sup>994</sup> <sup>995</sup> <sup>996</sup> <sup>997</sup> <sup>998</sup> <sup>999</sup> <sup>1000</sup>

2 Vern 11. Pow 97. Rule the same if the estate is acquired by the representative of the mortgagee. This rule however supposes that the heir has assets & is liable for the debt. Now independently of any rule of equity the same would be case at law. for original rules of common law would result in the same rule according to the principle of estoppel. The mortgagee is estopped by the covenant in his deed to deny that he had title at the time.

If the mortgagee of the term for years procures a renewal of the lease from the lessor after the expiration of the original term the new lease will be regarded as the renewal of the lease for the benefit of the mortgagee for the original lease is considered in equity as the inducement to the new lease. <sup>1</sup> <sup>2</sup> <sup>3</sup> <sup>4</sup> <sup>5</sup> <sup>6</sup> <sup>7</sup> <sup>8</sup> <sup>9</sup> <sup>10</sup> <sup>11</sup> <sup>12</sup> <sup>13</sup> <sup>14</sup> <sup>15</sup> <sup>16</sup> <sup>17</sup> <sup>18</sup> <sup>19</sup> <sup>20</sup> <sup>21</sup> <sup>22</sup> <sup>23</sup> <sup>24</sup> <sup>25</sup> <sup>26</sup> <sup>27</sup> <sup>28</sup> <sup>29</sup> <sup>30</sup> <sup>31</sup> <sup>32</sup> <sup>33</sup> <sup>34</sup> <sup>35</sup> <sup>36</sup> <sup>37</sup> <sup>38</sup> <sup>39</sup> <sup>40</sup> <sup>41</sup> <sup>42</sup> <sup>43</sup> <sup>44</sup> <sup>45</sup> <sup>46</sup> <sup>47</sup> <sup>48</sup> <sup>49</sup> <sup>50</sup> <sup>51</sup> <sup>52</sup> <sup>53</sup> <sup>54</sup> <sup>55</sup> <sup>56</sup> <sup>57</sup> <sup>58</sup> <sup>59</sup> <sup>60</sup> <sup>61</sup> <sup>62</sup> <sup>63</sup> <sup>64</sup> <sup>65</sup> <sup>66</sup> <sup>67</sup> <sup>68</sup> <sup>69</sup> <sup>70</sup> <sup>71</sup> <sup>72</sup> <sup>73</sup> <sup>74</sup> <sup>75</sup> <sup>76</sup> <sup>77</sup> <sup>78</sup> <sup>79</sup> <sup>80</sup> <sup>81</sup> <sup>82</sup> <sup>83</sup> <sup>84</sup> <sup>85</sup> <sup>86</sup> <sup>87</sup> <sup>88</sup> <sup>89</sup> <sup>90</sup> <sup>91</sup> <sup>92</sup> <sup>93</sup> <sup>94</sup> <sup>95</sup> <sup>96</sup> <sup>97</sup> <sup>98</sup> <sup>99</sup> <sup>100</sup> <sup>101</sup> <sup>102</sup> <sup>103</sup> <sup>104</sup> <sup>105</sup> <sup>106</sup> <sup>107</sup> <sup>108</sup> <sup>109</sup> <sup>110</sup> <sup>111</sup> <sup>112</sup> <sup>113</sup> <sup>114</sup> <sup>115</sup> <sup>116</sup> <sup>117</sup> <sup>118</sup> <sup>119</sup> <sup>120</sup> <sup>121</sup> <sup>122</sup> <sup>123</sup> <sup>124</sup> <sup>125</sup> <sup>126</sup> <sup>127</sup> <sup>128</sup> <sup>129</sup> <sup>130</sup> <sup>131</sup> <sup>132</sup> <sup>133</sup> <sup>134</sup> <sup>135</sup> <sup>136</sup> <sup>137</sup> <sup>138</sup> <sup>139</sup> <sup>140</sup> <sup>141</sup> <sup>142</sup> <sup>143</sup> <sup>144</sup> <sup>145</sup> <sup>146</sup> <sup>147</sup> <sup>148</sup> <sup>149</sup> <sup>150</sup> <sup>151</sup> <sup>152</sup> <sup>153</sup> <sup>154</sup> <sup>155</sup> <sup>156</sup> <sup>157</sup> <sup>158</sup> <sup>159</sup> <sup>160</sup> <sup>161</sup> <sup>162</sup> <sup>163</sup> <sup>164</sup> <sup>165</sup> <sup>166</sup> <sup>167</sup> <sup>168</sup> <sup>169</sup> <sup>170</sup> <sup>171</sup> <sup>172</sup> <sup>173</sup> <sup>174</sup> <sup>175</sup> <sup>176</sup> <sup>177</sup> <sup>178</sup> <sup>179</sup> <sup>180</sup> <sup>181</sup> <sup>182</sup> <sup>183</sup> <sup>184</sup> <sup>185</sup> <sup>186</sup> <sup>187</sup> <sup>188</sup> <sup>189</sup> <sup>190</sup> <sup>191</sup> <sup>192</sup> <sup>193</sup> <sup>194</sup> <sup>195</sup> <sup>196</sup> <sup>197</sup> <sup>198</sup> <sup>199</sup> <sup>200</sup> <sup>201</sup> <sup>202</sup> <sup>203</sup> <sup>204</sup> <sup>205</sup> <sup>206</sup> <sup>207</sup> <sup>208</sup> <sup>209</sup> <sup>210</sup> <sup>211</sup> <sup>212</sup> <sup>213</sup> <sup>214</sup> <sup>215</sup> <sup>216</sup> <sup>217</sup> <sup>218</sup> <sup>219</sup> <sup>220</sup> <sup>221</sup> <sup>222</sup> <sup>223</sup> <sup>224</sup> <sup>225</sup> <sup>226</sup> <sup>227</sup> <sup>228</sup> <sup>229</sup> <sup>230</sup> <sup>231</sup> <sup>232</sup> <sup>233</sup> <sup>234</sup> <sup>235</sup> <sup>236</sup> <sup>237</sup> <sup>238</sup> <sup>239</sup> <sup>240</sup> <sup>241</sup> <sup>242</sup> <sup>243</sup> <sup>244</sup> <sup>245</sup> <sup>246</sup> <sup>247</sup> <sup>248</sup> <sup>249</sup> <sup>250</sup> <sup>251</sup> <sup>252</sup> 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<sup>319</sup> <sup>320</sup> <sup>321</sup> <sup>322</sup> <sup>323</sup> <sup>324</sup> <sup>325</sup> <sup>326</sup> <sup>327</sup> <sup>328</sup> <sup>329</sup> <sup>330</sup> <sup>331</sup> <sup>332</sup> <sup>333</sup> <sup>334</sup> <sup>335</sup> <sup>336</sup> <sup>337</sup> <sup>338</sup> <sup>339</sup> <sup>340</sup> <sup>341</sup> <sup>342</sup> <sup>343</sup> <sup>344</sup> <sup>345</sup> <sup>346</sup> <sup>347</sup> <sup>348</sup> <sup>349</sup> <sup>350</sup>

Every mortgage takes the estate subject to the same incidents to which it was subject in the hands of the mortgagor.

If therefore a having mortgaged an estate for life or for a term of years & then attempts to alienate in fee the mortgagor forfeits his estate & the mortgagee's interest is lost.

2 P Wms 146. Price in Chy 572. 571. Powd 94. 100.

(Contra Price in Chy 105).

As between mortgagor & mortgagee the latter ought not to loose the security, but as to the remainder man the mortgagee ought to loose his interest.

So also if a particular tenant having mortgaged his interest commits waste this forfeits the whole estate including the mortgagee's interest the right of the remainder man is paramount.

But if the particular tenant commits felony or treason he forfeits only his estate of redemption. Div<sup>r</sup> III. For on commission of these crimes the crown can forfeit only his interest. Here the right of the crown is subject to the right of the mortgagee - seeing in the former case.

Who may claim a right to redeem -

This estate of redemption is called a trust, for the whole legal title is in the mortgagee, the mortgagee is therefore regarded a trustee for the mortgagor immediately after forfeiture & before foreclosure - 2 Atk 526. 1 Atk 606. Powd 15. 144. 321. 330.

Term 193 (11)

Eq. Cases 315 (11)  
no. 105.

Any person having an interest under the mortgage in the land subject to the mortgage or before it may redeem - If person who has used the land as a gift before mortgage may redeem. tho' his title is not good against the mortgagee - tho' it is good against the mortgagor, he can hold the land however only by redeeming.

If the mortgagor becomes bankrupt his Mortgages  
as securities may redem. His interest is transferred to Who may  
them, The liens of the mortgagor may redem. redem.?

The rules of the eq: of redemp: may redem.  
Poul. 69. 109. Doug 22. 1 Vern 33. 190. 1 Ch 71.

If the estate mortgaged is a fee  
simple & the mortgagor dies the heir may redem.  
or if the mortgagor devises his eq: of redempti  
the devisee's right supersedes that of the heir -  
2 Ves 304 (109 Poul) 2 Burr 978

An equity of redemp: of inheritances  
is governed by the same rule of descent which  
governs the descent of real property (1st)

If a term is mortgaged the Ex'r of the mortgagor  
may redem. Poul 109. 2 Ves 304. —

And by the common law a judge  
creditor of the mortgagor may redem. but  
this is not the law of Count - with us a  
judgt creditor unless he has a lien by attachment he  
cannot redem. & judgt. in Count creates no lien  
witht attachment - 3 Atk 200. 2 Do 440. 1 Vern 399  
60 Litt 102 Atk. 3 Bl 420.

In this state however an equity of  
redemption may be taken or Ex'd by a Gr of  
the mortgagor precisely like a legal estate  
this is founded on the construction of our  
statute - This cannot be done in Engl. -  
2 Atk 292. Poul 132. And in this case in Count  
is who has devied on the Eq: of Redemption may  
redem. for he then becomes owner -



Mortgages  
Who may  
redeem?

After the mortgagor's death the eq. of redemption is by the English law appt. to pay debts in Equity & fair paper - that is all debts without distinction of bond debts, book debts &c.

In this state when an Eq. of redemption is taken on Est. it is appraised & set off precisely like a legal estate - deducting & cover the debt due, from the value of the land -

The eq. with the proceedings completely vests in the Cr. the right of redemption

But many other persons may redeem -

The debt  
being entire  
cannot be  
separated into  
parts without  
consent -

The widow of the mortgagor if she has a jointure settled on her from the land mortgaged she may redeem & if it extends only to a part of the land she may redeem the whole & she cannot redeem part without redeeming the whole as the wife of the mortgagor - This rule supposes the jointure to be after the mortgage if made before the mortgage she would be entitled to the land in exclusion of the mortgagor -

I suppose the mortgage here is made <sup>with consideration</sup> after marriage &c.

And a jointure settled even after marriage will give the wife the power of redeeming the mortgage 1 Vern 33. 193.

1 Eq. ca 207. 2 Vern 212.

And where the jointure is made after marriage if she joins with the husband in making the mortgage she bears eventually one third of the redemption money. so if she pays the whole she will hold the land forever <sup>as the husband</sup> until the heir is reimburse her  $\frac{2}{3}$  of the redemption money.



As intimated, at law a life estate is worth Who may  
one third of the fee — This is a gold rule — redeem?  
1 Ch. 171. 1 Vern 191. Poul. 313-17

o If she did not join the husband in  
making the mortgage & she redeems she holds the  
whole land forever ag<sup>t</sup> the heir &c of the mortgage  
unless she is reimbursed the whole of the redemption  
money — (H) The jointure is here supposed  
to be made before ~~most~~ after the mortgage, as is the supposition  
in all the preceding rules —

o The reason why the wife even joining in  
the mortgage is, to postpone the wife's right of  
dower for if the mortgage is made during  
coverture her right to dower is paramount to  
the right of the mortgage.

When a feme sole mortgages her  
estate & marries & dies the husband has a  
right to redeem being tenant by the courtesy  
of her eq: of redemption —  
1 2th 603. Poul. 112-115

But the mortgagee's wife is not entitled  
to dower on his death & she cannot therefore  
redeem. this supposes the husband to make  
the mortgage before marriage —  
Poul. 321. (see ante)

There is no reason why this difference should  
exist between courtesy & dower —

Mortgages  
who may  
redeem?

On principle the wife certainly ought to have the right to redeem

In this state the widow in such a case is entitled to dower & therefore to redeem  
so in New York - 1 Bouv Rep 589. 6 John 290  
4 Bl 278.

o But to entitle the husband to convey in the wife's equity of redemption there must have been something similar to a seizure an actual possession of the est of redemption is not suffice there must be something equivalent to legal seizure. i.e. they must be a possession & a receipt of the profits <sup>of the land</sup> in the husband's being covisors - 1 Vern 298. 307. Powell 114. 116

A subsequent incumbrancer as a 2<sup>d</sup> or 10<sup>th</sup> mortgagee may redeem of the first - the legal title is in the first & the 2<sup>d</sup> cannot have the legal title without redeeming the first

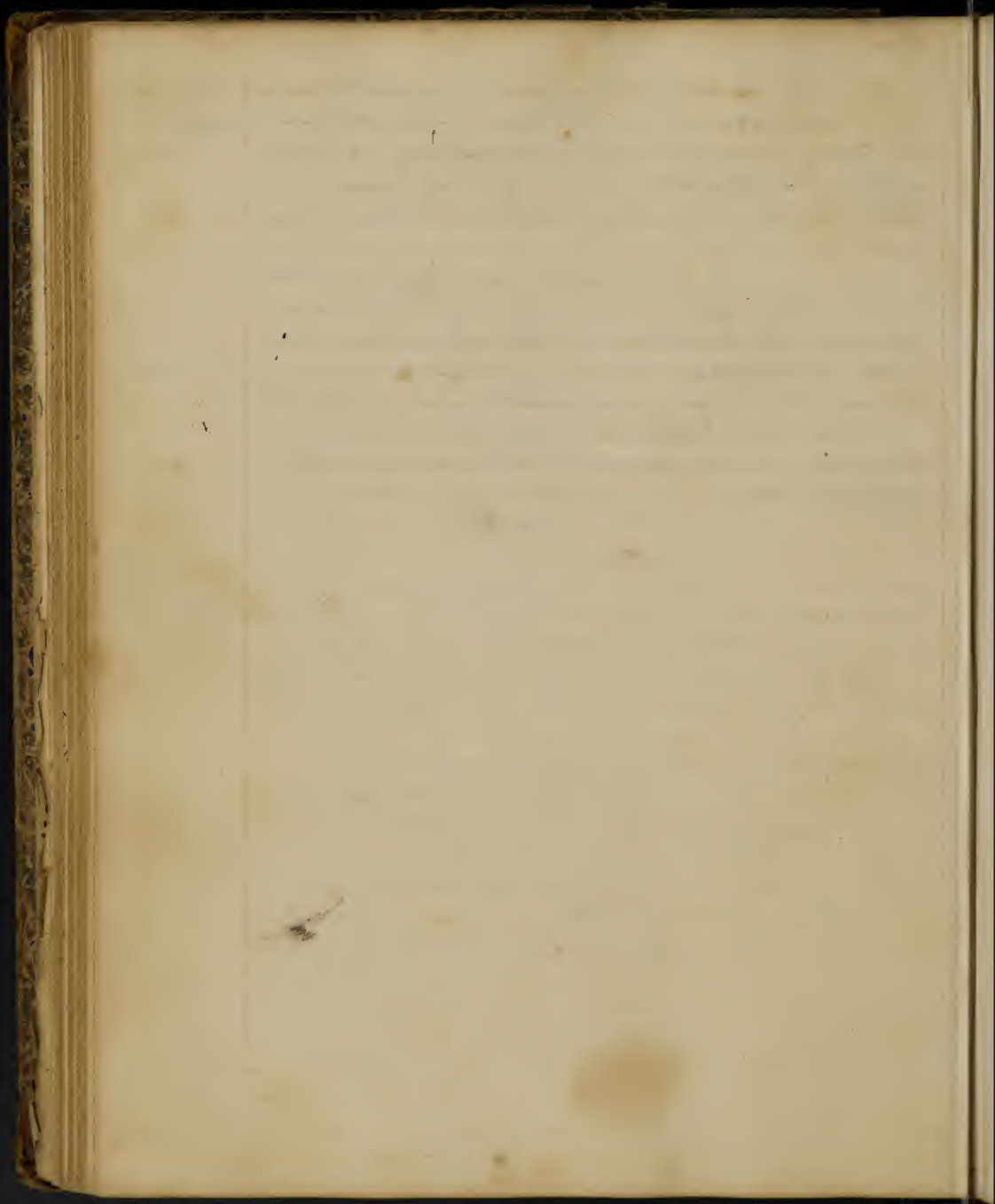
So also a judge creditor of the mortgagee may redeem from the mortgagee but this rule does not hold here except he "see ante"

2 Ch in 170. 2 Vern 163. Powell 117-194

And the 2<sup>d</sup> mortgagee by redeeming the first acquiring a right in the land to the amt of what he paid the first mortgagee & also to the amt of his own debt - p 161

If a subject mortgagee or a junior creditor who may  
or an under-tenant of the mortgaged premises redeem?  
the mortgagee himself has still an ultimate  
right of redemption out of the hands of  
either of the mortgagees who have thus redeemed.

Suppose a mortgage on estate  
to B & then to C. now C's debt is a second  
lien on the estate. If then C redeems the  
first mortgage. A may still redeem by  
paying to C his own debt & the debt of B.  
And this ultimate right to redeem  
descends to the heir the devisee & to the  
assignee &c —





# Real Property Mortgages.

Jan 7<sup>th</sup> 1825. No 8.

The mortgagee has an eq. of Redemption.

If there is a tenant for life & a remainder or reversion in fee of an equity of redemption the tenant for life is to pay one third & the remainder man is to pay two thirds of the mortgage debt.

And therefore if tenant for life pays the whole his representatives may hold on to the estate until the remainder man or reversioner pays two thirds of the mortgage money. See in G. 62. 44 Poul on ell 12 p. 1 Ch R 221.

The rule establishing this proportion holds however only where the proportions are adjusted during the life of the tenant for life. If the redemption is agreed upon & had during the life of the tenant for life the proportion is as before stated.

But if the redemption money is paid after the death of the tenant for life his representatives are to bear that proportion of the mortgage money which the actual enjoyment of the tenant for life was worth. 1 Vern 404. Poul on ell 121.2

If the mortgage money is payable on a contingency not yet arrived the remainder man or reversioner may exhibit his bill against the tenant for life requiring him to keep down the int<sup>l</sup> on the mortgage money during his possession or have the possession of the Bill is the only remedy. Poul on ell 121. 442 This is called a bill 'quia timet'.

Rule now altered  
remainder man  
now pays the  
whole debt &  
tenant for life  
keeps down  
interest

Cur 15th 44  
551.  
4 Kent 46  
5 Dick 146  
8 John 482  
Cur 5th 3015  
41

and

84

C 121.2

121.2

Mortgages  
How far an Eq.  
of Redemption  
is a p<sup>er</sup>ty.

If tenant for life pays the whole debt & takes from the mortgagee a reconveyance & makes improvements on the land the remainder man on redeeming from the representatives of the tenant for life must pay for two thirds of the permanent improvements.

But he pays no int on the money whl these improvements last.

No does he pay any int on what the tenant for life paid to the mortgagee  
2 Eq. ca. 59. 30n<sup>e</sup> 121. 442. For it is the duty of t<sup>en</sup>t for life to keep down the interest.

An Eq. of Redemption is never a p<sup>er</sup>ty at law. For the estate of the mortgagor at law is forever gone after the condition is broken.

Hence when an action at law is bro't agt one who inherits an eq. of redemption he may plead "nothing by descent" notwithstanding the eq. of redemption.

But where a term for years or an estate for life is mortgaged there is a reversion & this reversion may be a p<sup>er</sup>ty at law tho' the Eq. of Redemption never can be.  
2 Vern 61. 2 Atk 294. 30n<sup>e</sup> 130  
110.

But an Eq. of Redemption is a p<sup>er</sup>ty in equity & in equity a Ct will compel a sale of an eq. of redemption for the purpose of paying the debt of the mortgagor. So if the brs of a mortgagor are obliged to resort to an eq. of redemp<sup>t</sup> & the heir has sold the Eq. of Redemption he must apply the money to the paym<sup>t</sup> of debt. 2 Vern 61. 1 Vern 411. 2 Atk 294.  
3 P<sup>er</sup> M<sup>rs</sup> 384.

The rule however supposes a deficiency of Mortgages personal assets for neither an Eq. of Redemption nor How far an any other real estate is liable for debts while there is Eq. of Redempt<sup>n</sup> personal prop<sup>y</sup> - As an Eq. of Redemption is only equitable is a petty assets if follows that all the mortgagor's debtors are to be paid pari passu for in equity there is no priority between diff<sup>t</sup> kinds of debts. 2 Bl 511. (H)

In this state all eq. of redemption are assets at law. this rule is founded on the construction of our Statute - It is in bond assets in a ct. of probate.

• An eq. of redemption is devisable for the paymt of debts & in this case creditors are to be paid pari passu. 2 P Wms 412. 2 Atk 50. Bou 139. 126. 1 Vern 63. 69. 101. - But this devise is good only in Equity

• There was formerly this distinction if an Eq. of redemption was devised to a bare trustee to pay debts the Eq. of Redemption was equitable assets. But if it was devised to an executor &c it was legal assets but it is now held that in both cases it is equitable assets & liable pro rata for the payment of all debts. Bou 126. 128. 1 Vern 63. 69. Co Litt 112:13 in notes 181.

• But tho in genl there is no priority of debts in equity yet a second mortgage will be entitled to the payt of his debt before any genl creditor or before a subsequent mortgage because the mortgage has a specific lien & is therefore preferred before other creditors & he will be preferred before the subsequent mortgage because he is prior in tempore -

1 Vern 101. Bou 130:1

• This rule however is no exception to the genl rule that in equity there is no priority of debts for the second mortgagee is preferred merely because he has a prior lien.



Mortgages  
Who may  
redeem?

2 Eq ca 605  
1 Vern 182

Mr Powl says that no one can redeem except  
him who is entitled to the legal estate but

the meaning is that no person is  
entitled to redeem unless he has a vested  
title in <sup>to the equity of Redemption</sup> equity, & a right to call for the  
legal estate by a bill in equity. - & genl  
creditor then is not entitled to redeem, he has no  
equitable vested interest in the Eq of Redemption,

a b of equity will not allow a  
younger son to redeem while an older is  
yet living for the younger son has no vested  
title in equity & no right to call for the legal estate  
by a bill in equity. 2 Eq ca 605. 1 Vern 182 Powd 133:4

But if he in whom the title to the eq:  
of redemption is, refuses to redeem any other  
person having a claim to the mortgagor's assets  
may in equity redeem Barna 30. Powd 133:4  
Powd 130. i.e. after the death of the mortgagor, &  
indeed the rule is the same after he becomes bankrupt,

o And in the common case of a mortgagor's  
heir refusing to redeem his genl creditors may  
redeem but they may not redeem unless he  
refuses for they have no title to the eq of redemp  
(24)

It is a pervading principle of Ets  
of equity that the right of redemption is a mere  
creature of equity, those Ets will always make  
it subservient to their own rules therefore  
he who seeks equity, must do equity



And hence a l<sup>t</sup> of equity will leave Mortgages  
a redemption either absolutely or conditionally <sup>themselves</sup>  
as the justice of the case may require & this holds Redemption  
not only as to the mortgagor but as to all who may claim  
under him a right to redem - 2 Vern 350. Cow 501.  
Powl 135 - 2 Vern 207.

For example a mortgagor applies to  
redeem on payt of the debt provided he cannot  
set aside the mortgage in a l<sup>t</sup> of law a l<sup>t</sup>  
of eq in such case will not decree a redemption unless  
he will withdraw his suit at law. on the principle that  
he who seeks equity must do 2 Vern 536

So if a mortgagor having previously  
attempted to set aside the mortgage at law  
& having failed & then applied to redeem the  
mortgage, will compel mortgagor to pay the  
expenses of the mortgages in the suit at law  
or not redeem - 2 Vern 536 207. 1 Vern 245.  
2 Eq ca 325. Powl 135 - 140. 470.

There are various other cases in which  
a l<sup>t</sup> of equity will impose conditions.

The mortgage can never compel the  
mortgagor to redeem before the day of payt  
Yet a l<sup>t</sup> of equity in case of a hard  
bargain will decree that the mortgagor  
may redeem before the day of paymt as if  
the value of the land mortgaged suddenly  
rises in value so that the rent w<sup>d</sup> satisfy the debt long  
before the day of paymt. 1 Vern 132. 183. 394  
Powl 377. q. 124 137. q. 1

Mortgage  
Terms of  
Redemption

If possession is obtained as<sup>t</sup> the mortgage  
by fraud pending a bill to redeem a Ct of  
Equity will not decree redemption until the  
mortgagor gives up the possession 2 Eq: ca 599  
Pon. 139. 126 This Ct will admit of no fraud  
no shuffling. no unfairness.

If a man mortgages black acre to  
secure one debt & white acre to secure another  
deb<sup>t</sup> <sup>to the same person</sup> one of the securities being sufft & the  
other deficient the mortgagor may not  
redeem one piece of land without redeeming  
the other. 2 Vern 207. 256. 1 Stb Eq. 245.  
Par. 139. The same rule applies where the  
mortgagor's heir applies to redeem —  
vide 1 Eq: ca 325. re. re. 1 Vern 245

The interposition of a Ct of equity  
in a case merely equitable is said to  
be discretionary. Therefore a Ct may say  
it will not decree in favour of the Plf  
unless the Plf will do so & so. a Ct may  
not make a new contract on the ground  
that they may alter a contract but they  
may withhold their interposition unless  
the Plf will agree to some terms.

As in the last case if the mortgagor  
had brought his bill that the mortgagor should  
redeem both the pieces of land a Ct of equity would not  
make such a decree for that would change the contract.  
The discretion of a Ct of equity  
consists in withholding its interposition not  
in extending it.

✓ The purchaser of a mortgage may hold Mortgage  
the land upt the mortgage & his heirs until Terms &  
the whole debt is paid whether he gave more Redemption  
or less than the whole debt. If the purchaser  
paid more the mortgagee may redeem on paying  
the whole debt 1 Vern 336. 464. 476. Salk 155  
Powl 140. 141. If he paid less the mortgagee must  
still pay the whole debt or not redeem - Pow 127.

✓ But as aft a subsegt incumberance  
or a 2d mortgage, the purchaser if he gave  
less than the sum due can hold only for the  
sum wht he gave & the sub<sup>t</sup> incumberance  
may redeem by paying what the purchaser  
paid.

For the sub<sup>t</sup> incumberance has as  
good an equity as the purchaser. But I think  
the reason for this rule is unsatisfactory & the  
rule ought to be diff<sup>t</sup>. - 1 Vern 476. 464. 476  
2 Sd 353. 1 Eq ca 330. 1 Vern 49. Pow 141. 142.  
Pow 129 The rule seems to take from one man his  
rights to preserve another from loss.

If the mortgagee is indebted to the  
mortgagee other wise than by the mortgage debt  
It was repeatedly held that the mortgagee could  
not obtain a decree to redeem unless he paid  
both debts. But this rule has been denied. I think  
properly denied - 1 Vern 41. 244. Salk 54.

2 Eq ca 603. Pow 143. 342. (3 Bro 69 162 1 Ves 2573. 2 Sd 376 336 2706 Eq 277)

It has always been held that if  
the mortgagee had brought a bill to foreclose the  
mortgagee could not have been compelled to pay  
both debts.

Powl 511: 15 2 Eq ca 603  
(3 Sd 397 contra). Pow 130. - It was only when the  
mortgagee was 2d that such conditions were imposed.



Mortgage  
Terms of  
Redemption

Yet if the mortgagee's heir brings a bill to redeem he must pay both debts tho' according to late authorities the mortgagor himself would not have been compelled in such case to pay both - Pow. 143: 4. 1 Vern 245. 1 P Wm 775. 1 Reasby 3 Atk 630. 3 Br 64 162.

The reason of this is if the heir was allowed to redeem without paying the debt not secured by mortgage the heir would immediately make himself liable for this debt whereas he was not before ~~made~~ personally liable to pay the other debt

and circuity would be occasioned by not making the heir pay both debts.

But if a bill were brought to foreclose the rule w<sup>d</sup> be diff<sup>r</sup> conditions cannot be imposed on a debt in Chancery.

If a lease for years is mortgaged & then a new debt is contracted by the mortgagor & then he dies his executor cannot redeem the mortgage without paying both debts, for the reason above 2 Vern 177. See in 69572 3 Lick 240. Pow. 144: 5.

In the case of the executor it makes no difference whether the debt not secured by mortgage is a simple contract or a bond debt. But in the case of an heir the debt must be a bond debt or he is not obliged to pay it on redeeming, for here the reason fails - the lands w<sup>d</sup> not become appts to pay this debt when recovered by the heir & therefore no circuity is prevented by discharging the heir to pay both but on the other hand such a decree w<sup>d</sup> make the heir liable where he w<sup>d</sup> not otherwise be liable.



If there are several incumbrances & the first Terms of  
mortgage has a debt against the mortgagor besides the Redemptio  
mortgage debt that debt will be postponed to all  
the subsequent incumbrances for that debt tho' a  
bond debt is no lien on the land & a subsequent  
incumbrance has a higher claim both in law  
& in equity to the land covered by the mortgage  
than any genl creditor can have.

2 Atk 52 3 Atk 240 1 Ves 87 3 Atk 550.

3 Atk 14 Pow 145:8

This rule holds of all subsequent incumbrances as  
of judgt creditors. or by stat staple &c - & it holds  
also as to the assignee of the mortgage who may redeem  
with paying <sup>both debts</sup>. Now under the st of fraudulent devises  
the devisee as well as the heir must not only pay  
the mortgage debt but the debt not secured by  
mortgage such debt must I suppose be bond  
debt. See in Chy 511. 1 Eq ca 325.

The assignee may redeem without paying more Pec in Chy  
than the mortgage debt, his Equity is like that 511. Atk 1107  
of a subsequent mortgage, he has an interest in the land Vesey 87 562.  
1 Eq ca 325.

But the assignee of the mortgage has the  
same equity as the mortgagor his heir & devisee  
if he has a bond debt as the mortgage himself  
would have had in the same case.

(Pow 145:6). If part of the mortgage money Worm H. Pow 147:8  
has been p<sup>d</sup> & a further sum lent the mortgagor can not - 342  
redeem without paying the latter debt. But this rule must now be qualified

Where the mortgagor &c are Rife to a  
bill in Chy that it will carry the debt beyond  
the principal penalty if the principal & int<sup>l</sup>  
amt to more than the penalty. 2 Eq ca: 611  
3 Atk 515. Pow 146:7.

Mortgage  
Time of  
Redemption

But on a bill to foreclose the court  
must not carry the debt beyond the penalty,  
for the court has no discretion to impose terms on  
the debt to a bill (ante)      3 Ack 154. Pon<sup>c</sup> 146.7  
3 122 432

Cts of law have of late sometimes  
given more than the penalty, where the principal  
& int exceed the penalty. But the decisions on this  
subject are contradictory.

The mortgagee may be defeated of  
his right of redemption by lapse of time after  
the forfeiture when the mortgage is in possession  
but length of possession by the mortgagee  
under a forfeited mortgage is not per se  
a defeat of the equity of redemption for  
mortgages are not strictly within the act  
& limitations for that it does extend only  
to legal estates (Pon<sup>c</sup> 148. 1 Eq ca 315. 3 P Wms 287)  
& the estate of the mortgagee is an equitable estate.

There is another reason why the act of  
limitations does not run which is that the  
mortgagee's possession is not adverse to the mortgagor  
for he holds under a tacit acknowledgment  
of the mortgagor's title & therefore cannot be a  
disseisor. There is nothing which amounts to an  
ousting of the mortgagor, he goes in under the deed  
of the mortgagor. But Cts of Eq so far imitate the act  
as to consider 20 yrs possession after the forfeiture  
by the mortgagee as prima facie a bar to the  
mortgagor. In Conn<sup>t</sup> the time is 15 years  
1 Eq ca 315. 3 P Wms 287. 3 Ack 313

Pon<sup>c</sup> 148. 160

One ground of this rule is a presumption Time of that the mortgagor has abandoned all thought of Redemption of redemption & another reason is the difficulty of making up the accounts between mortgagor & mortgagee. And another reason is the policy of discountenancing stale claims. Wh. was the principal reason of making the st of limitations. —

The presumption then is that after 20 yrs possession after forfeiture by the mortgagor the mortgagor has abandoned the right to redeem but circumstances may rebut this presumption & these circumstances are such as bring a case within the saving clause of the st of limitations in the case of a legal estate.

As where the Eq of Redemption when the mortgagee takes possession after forfeiture is owned by an infant & feme covert or idiot a person beyond seas — & any circumstance which shows that the retention of mortgagor & mortgagee has been recognized by the mortgagee within 20 yrs before the bill brought will remove this presumption. 2 Ventres 340. Don. Hy 153. 161. 2 Atk 333. 2 Vern 418. Ex If the mortgagee has rec<sup>d</sup> interest on the mortgage debt within 20 years. &c.

Now the time from wh. this presumption begins to accrue is that of the mortgagee's taking possession of a forfeited mortgage or at the time of the forfeiture when the mortgage is already in possession. The presumption never commences until the forfeiture. For before that time the mortgagee had no means of redeeming & obtaining poss<sup>n</sup> either in law or in Equity.



Time of  
Redemption

If the mortgage has made up the account of rents & profits this fact rebuts the presumption & removes the presumptive bar to 20 years from that time 2 Atk 333.  
2 Vern 415. Pow 153.

The time allowed for redemption after the removal of any of the legal disabilities mentioned before as infancy &c is 10 yrs in Engl<sup>d</sup> & 5 yrs in this state following the St of limitations 3 L 1111. 207. Pow 149

And if any fraud has been practiced on the mortgagor to prevent his taking advantage of the right of redemption no length of time will operate as a bar to the right of redemption. No length of time will bar relief as a point - as when it is made a condition that the mortgagor should redeem with his own money. Or when the deed was made absolute & falsely read to the mortgagor. & mortgage remain? in poss<sup>n</sup> more than 20 yrs Tall 63. Pow 151.

But if the 20 yrs have begun to run the intervention of any of the legal disabilities will not save the right of redemption, in which case also the St of limitations is follow.

As suppose upon forfeiture the mortgagee takes possession while the mortgagor is within the realm & he immediately leaves the realm 20 yrs. the eq<sup>y</sup> of redemption is prima facie gone from the mortgagor 2 Vern 418.  
1 Eq. ca 315. 2 Atk 333. Pow 152.



But when it is agreed that the mortgagee shall take possession & hold until the rents & profits shall satisfy the debt no length of time will bar the right of redemption. for the possession is here not adverse but on the other hand it is according to agreement. 1 Vern 418. Pown 156. Time of Redemption

And here is no chance for the presumption of abandonment to arise the mortgagee <sup>can</sup> not get possession until after the debt is satisfied.

And in the case of a Welsh mortgage length of possession by the mortgagee is never a bar to the right of redemption.

For a Welsh mortgage is never even at law forfeited Pown 356. 2 Atk 363. 1 P Wms 291 2 Vern 701

Indeed any act of the mortgagee whatever by which he has tacitly recognized the right of the mortgagor to redeem will preserve the right of redemption 20 yrs from that time.

Thus if the mortgagee has entered into a treaty to purchase the eq: & redemption the mortgagor may redeem 20 years from that time. 2 Eq. ca 596. 1 Br. 26309 526194 Pown 154. Or if the mortgagee brings a bill to foreclose this tacitly recognizes the right to redeem.

If the mortgagee continues in possession the right to redeem is never barred.

Pown 150:1

Devise of mortgages

The inst of the mortgage & matgaga is devisable & when the inst of the mortgage is devised the devisee may foreclose. Don't 166. for devise is a testamentary assignee of the mortgage

And under the words "all my mortgages" the whole inst of the mortgage in the mortgages will pass without any words of inheritance

This was formerly diffc but the rule is correct for a mortgage is only a chattel in the mortgage. 2 Bun 978. Don't 170 - (bro 6 447:9:50)

18 The whole inst of a mortgage will pass by such words in a devise as in case of a devise of legal estate will only carry a life estate. - On the other hand the mortgage inst will not pass under such words as these "all my lands" "all my tenements" - (ante/ Darns 457  
2 Eq. ca 666. 2 Vern 621. 1 Vern 3. 2 Vent 351

If the mortgagee devises his inst the devisee may bring a bill to foreclose & the heir of the mortgagee need not be a party tho' it was formerly held differently. for the heir has no title to the land or mortgage. Don't 175. 45. 1 Eq. ca 315.

It has been questioned whether a devise of a mortgage will be good with the circumstances required in the st of devises & frauds & perjury. but it is evident that it would be good for the mortgage is a chattel inst & not "real estate". 2 Bun 978. Barth 79-81. 3 Allod 260. Don't 175:9

## Priorities of incumbrances

Mortgages

If there are several mortgages &c on an estate priority of claim takes place between <sup>them</sup> according to the dates of the several incumbrances if of their deeds & securities. Qui prior est tempore potior est jure 2 Vern 524. 1 Eq. ca 142. 2 Vern 81. 2 Ves 477. Talb 68. Powd 181-190. And in this respect mortgages stand on the same ground as judgts statutes & leases w<sup>h</sup> create liens according to their respective dates.

But this priority may under some circumstances be defeated & a prior incumbrance be postponed to a subsequent one — This happens first where a prior incumbrance has been guilty of fraud or neglect, to the injury of a subsequent incumbrancer.

And 2<sup>d</sup> where a subsequent incumbrancer purchases the legal int for the purpose of tacking his mortgage to it & of excluding a mesne incumbrancer w<sup>h</sup> is called tacking. 2 Atk 49. 3 P Wms 280. 1 Ves 360. 13 R 45. Powd 153-155. 194-5. 1 Vern 187-8. 2 Ves 573. Stra 240.

If a first mortgagee conceals his mortgage by artifice to induce a third person to lend money &c on the same security. this third person is <sup>recony</sup> prior to that of the first.

As if a first mortgage is present when J<sup>s</sup> is lending money to the mortgagor on the security of the mortgaged premises & he holds his peace the 2<sup>d</sup> mortgage J<sup>s</sup> will be prior to the first. Roberts 528:9. Barna 101.

2 Atk 49. 1 Powd on Con 132-5. 1 Vern 370. Prec in Ch 35. Pw Ed 113-



If the first mortgage is witness to a second mortgage deed of the premises & knowing the contents of the deed does not make known his mortgage he will be postponed to the second. 21 Wm 3. 73. Pow 2156

And it has been held that in this case the witness shall be presumed to know the contents of the deed but this is a harsh rule & probably is not law. 1 Ves & C. 180 64357  
It was disapproved of by Hardk & Shirlow, in common experience the witness knows nothing of the contents -



Real Property (Vog)

Mortgages. — Modes of losing priority. —

If the first mortgagee is guilty of any neglect by which another is encouraged to advance money on the same security the first will be postponed to the second as if a first mortgagee leaves the title deeds in the hands of the mortgagor & in consequence of this a third person is induced to lend money on the same security this third person will be prior to the first mortgagee.

For where one of two innocent persons must suffer he who is guilty of the neglect which occasions the necessity must suffer rather than the other —

1 Ves. 360 1 Vern 136. 3 P. Wms 280

1 T. R. 755 762:3. 2 Vent 337. P. 187.

This rule however has no application to the law of this state for here title deeds are no evidences of an absolute right as it is in Engl<sup>d</sup>. But registering is here evidence of title — Here title deeds are never delivered over to the purchaser.

In Engl<sup>d</sup> the mere act of pledging of title deeds is a lien upon his land & a b<sup>y</sup> of Eq. will enforce this lien, it makes an Equitable mortgage  
1 Br. 342 296. 2 East 486 —

This rule too is inapplicable to this state. How far such a pledge would be regarded as between the parties in this state I cannot say but as against a third person it can have no effect. for this act does not appear on the public register —

Mortgages.  
Priorities.

If one who is about to lend money on a mortgage inquires of a former mortgagee if he has a mortgage on this estate & the mortgagee denies that he has any mortgage the former mortgagee will lose his priority if he knew that the latter was about to lend money on this security see not. (2 Vern 554. Pow. 159. 90.)  
for a man is not bound to satisfy impertinent curiosity.

Where a subject claimant obtains the legal estate he becomes prior to any other

The first mortgagee always has the legal estate & the subject claimants have from the mortgagee only an equitable interest but if a subject mortgagee purchases from the first mortgagee the legal estate he may thus protect his equitable estate by the legal estate. for where the equity is equal the legal estate must prevail, this is the great principle on which is founded the doctrine of tacking.

Thus suppose three mortgages in succession to A B & C. now C by purchasing A's mortgage has a priority to B not only for A's mortgage debt but also for the debt due to himself. There is this proviso that C at the time of lending had no notice of B's intermediate mortgage. 2 Vent 337. See in Chy 226. 1 Vern 127. 8. 2 Ves 575. Stra 240. Pow. 195 149 214 228.

Why does C obtain a priority over B for both Tacking debts? because the equity is equal & C has the legal estate in addition to equal equity with B. If however C at the time of lending knew of B's mortgage he has not then equal equity with B in respect to his own debt. 1 Donbl 310. 2 Attk 53 17d 763. 2 Vern 577. (1 Vern 158, 2 Vera 574. 2 Vent 337 Don 197. 212. 231:7.)

But the third mortgage may thus tack tho' he had notice of the intermediate mortgage at the time of making his own mortgage if he had not such notice at the time of making the loan or of contracting the debt for then he does not want only interfere with another man's right. & there is nothing inequitable in it. (JL)

As to this last case if one of two innocent persons must suffer with any fault 1 Vern 49 or either side each has a right by any legal 2 Bb 279 means to catch the "tabularum in naufragis". Don 198 214 And the subject incumbrance may thus tack 229. not only by purchasing the first mortgage but by purchasing the first incumbrance whh carries the legal estate as an outstanding term. a judgment. a statute merchant or staple. or a recognizance

An outstanding term is meant a long term created by some ancestor who wishes to make provision for younger children & is placed in the hands of trustees until the heir pays to younger children certain portions & obtains a release



Packing-

The gene rule of priority is subject to this exception. When one of the parties has more equity to call for the legal estate than the others tho the right to call for the legal estate is not vested he is preferred to prior incumbrances.

As where there are several incumbrances a subsequent incumbrancer has contracted for the legal estate. & is bound to pay for it tho the legal estate is not actually conveyed to him nor has he yet paid the money for the legal estate. 2 Ves 486. 2 Vern 600. Den 194. 204 212. 251 2 Ch 113.

The principle of this rule is that equity will consider us done what ought to be done or have been done & this is an universal principle in equity in the case of executory agreements that be will enforce.

If a subsequent incumbrancer purchases a prior satisfied incumbrance judge to all carries the legal estate he will by this means obtain a priority over a mortgage made before his.

1 Vern 137. 2 Vern 30. 159. (Hardrap 172 contra) Den 214 172 776 arguendo.

A satisfied term is one in which the heir in the case before supposed has the profits but not taken a lease. A satisfied mortgage is one paid but paid after forfeiture in which case if not released it still carries the legal estate. Suppose then 3 mortgages to A B & C. & C's mortgage is paid after forfeiture but no reconveyance to make this mortgage then purchased by C will give to C the legal estate & therefore a priority to B.



The principle of this rule is that in the case supposed C has equal equity with B. & the most trivial circumstance will give B's claim the preponderance

Tacking

And this rule holds tho' the subject incumbr:  
obtained the legal estate without paying a farthing  
for it 1 Eq. ca 332. 2 Vern 279. Pow. 214.

If the subject incumbrancer has the actual  
possession of the prior mortgage <sup>deed</sup> first of all carries  
the legal estate whether he ever bought it or not  
the mere possession of it will give the subject incumbrancer  
the privilege of tacking - the slightest circumstance  
turning the scale - This rule prevails not in this state.

It has been determined that if the subject  
incumbrancer obtains the evidence of the legal  
estate by fraud even then he will have a priority  
over the intermediate incumbrancer 2 Vern 159  
1 Bb. 52. Banbury. 298. 1 Pow. 215 - This rule does not  
satisfy A. It may well,

Where the first incumbrancer purporting to  
carry the legal estate is defective in requisites it  
will carry no privilege of tacking to the person in  
possession of it. Thus suppose an absolute deed  
made to C which is deficient in legal requisites  
C by purchasing it obtains no priority over B.  
2 Vern 234. 1 P. Wms 340. 2 Eq. ca: 592. Pow. 215.

For now the purchaser has not the legal estate

Tacking.

And a subseq<sup>t</sup> incumbrancer can obtain no priority by tacking by purchasing in any incumbrance wh<sup>ch</sup> does not carry the legal estate. As suppose four mortgages & D purchases B's mortgage D obtains for his own debt no priority over C. In he has not the legal estate, 2 P. Wms 495. 15 R 773

If a subseq<sup>t</sup> incumbrancer has not equal equity with an intermediate one he can obtain no priority by purchasing that wh<sup>ch</sup> carries the legal estate. A creditor therefore cannot by purchasing the legal estate tack to that legal estate his judgment supposing him to have obtained a judgment for the C's lien is but a gen<sup>l</sup> one & the subseq<sup>t</sup> incumbrancers have a specific lien the Equity therefore is not equal for a gen<sup>l</sup> lien in equity is always less than a specific lien. 2 P. Wms 491. 2 V. 662 Price in Ch 494. 310. 1 Eq: ca: 325. Pow. 224. 6. 2 Atk 347.

It is suff<sup>t</sup> to state that the mortgage is foreclosed at the time of the till bid

A prior mortgage purchased in by a subseq<sup>t</sup> incumb: will give no priority <sup>until</sup> it is foreclosed for a Ct of Eq has no concern with it before foreclosure 2 Vern 156. Pow. 228. 9.

and in such a case as this if the Ct of Equity should decree a priority in favour of the third aft<sup>r</sup> the second the mortgagee may pay up the debt before foreclosure & then the legal estate is in the mortgagee.

A prior incumbrancer having the legal Tacking.  
estate may tack a subsequent sum of money lent on  
the same security so as to gain priority for the  
last loan before a subsequent incumbrancer provided  
however the first mortgagee did not know of  
the subsequent mortgage when he lent the money for  
if he did know he would not then have equal  
equity with the subsequent incumbrancer

For when he lent the money without  
notice he has equal equity with the subsequent mortgagee  
& having besides this the legal estate he shall have priority  
2 Atk 352. 2 P Wms 494. 1 Ves 662. (2 Atk 352. 3 P Wms 494  
2 Ves 662) / See in Ch 226. 2 Eq: ca 594. Pow 230:1)

If the first mortgagee obtains a judgment he retd 352  
may tack on an intermediate mortgagee - I G 2 P Wms 494  
cannot reconcile this rule with the rule that Vesey 662  
a subsequent judgment creditor cannot tack by purchase Pa 230.  
using the legal estate -

When the prior incumbrance is defective  
a subsequent mortgagee with notice of that mortgage  
will have priority over the prior incumbrance  
not by tacking for he does not need it for the  
legal estate is at inuicio in him.

Pow 204 232. 3 Sac 644

I should doubt this rule the second  
mortgagee with notice certainly has not equal  
equity with the prior incumbrancer. &

A defective mortgage will in equity <sup>be</sup> enforced not  
only agt the mortgagee but agt the general creditors  
of the mortgagor who have no specific lien upon  
the land for the mortgagee can in equity be  
forced to supply a good mortgage when it was  
first defective & be claim under the mortgage & be  
liable to the same equity. 2 P Wms 491 1 Eq. ca 320 2 Vern 564  
1 Atk 447 Equity considers as done what ought to have been done -



## Notice

If the first mortgage contains a clause making the mortgage security for future loans & if the mortgagee not knowing of any subsequent mortgage lends to the mortgagor money he will be allowed to tack this money to the original mortgage but if he had notice of the subsequent mortgage when he made the second loan he will even then hold for the second <sup>loan</sup> mortgage if the subsequent mortgage had notice of this clause respecting future sums of money in the mortgage

Point 255. 236. 7 Vinier 52 See in Ch 236 2 Vent 361 2 Ves 450. 3 P. Wms 423. - The future loans has relation back to the original contract & will be part of the original mortgage debt.

But suppose neither had notice I suppose in that case the first mortgage would have priority for he has equal equity & in addition the legal estate.

In this state such a clause w<sup>d</sup> have no effect for here the incumbrance must appear on the record & here the sum does not appear tho' this clause does appear. The right of tacking incumbrances seems to depend very much upon Notice

Notice is of two kinds. actual & presumptive One is said to have had actual notice when he has been subscriber to any instrument wh<sup>l</sup> contains the fact in question - i.e. subscriber as a party - & when regular notice has been served upon one

Point 256 so if one has been actually informed by a party - Good rumour is not actual notice (Ib) ex gra where one receives information from a stranger - Good rumour is not actual notice (Ib)



Presumptive notice is a conclusion of Presumptive law that a person has notice where actual notice Notice, cannot be proved.

Ex. A made a deed to B reserving a power of revocation B conveyed the same subject to C. it afterwards revoked & this was held to be a good revocation aft B. for every purchaser ought to examine the title deeds 1 Vern 319. 2 Bolls 2 Eq cas 615. This example could not happen under my law for a clause of revocation must be upon the public record.

If J.S. devises land to A subject to certain legacies & A mortgages the land to B who has no actual notice of the legacies. yet he is deemed to have notice for he ought to search out the devise. This case is applicable here. 1 Ves 215 (M) Pon<sup>d</sup> 257.

Where an ex'or sells the personal assets of the testator the purchaser is not presumed to know any charge upon the assets & he will hold aft the person who has the charge on the assets for possession is evidence of title to personal property. 1 Ves 173 3 Atk 236 10 Wm 145-50. Rob on fr. cor. 602 (14). 2 Vern 444 And the purchaser may with imputation of fraud & negligence trust to the paper of the vendor as evidence of title & need not look at the title deeds at the will of. Those in whom fraud the charge is made must look to the Ex'or.

If there is collusion between the Ex'or, 2 Vern 118 & purchaser, the latter will be liable to the 1 Ves 215 charge, Pon<sup>d</sup> 2015.

Presumptive  
Notice

If a deed creating a <sup>prior</sup> charge upon an estate is delivered over to an intended purchaser <sup>with other papers</sup> the purchaser is presumed to have notice of the prior charge & this presumption cannot be rebutted for it is his duty to examine the title deeds. 2 Vern 384. 2 Ves 486. Pow. 266. 271.

A recital in one deed stating & implying an incumbrance on the estate created by another deed is presumptive notice that he who has had possession of the prior deed has had notice of the incumbrance. 2 Atk 54. 1 Ves 387.

And generally whatever facts are suff<sup>t</sup> to put a party charged with notice on inquiry & deemed suff<sup>t</sup> notice in Equity.

Upon this principle when certain infant children when of full age found a certain person in possession & rec<sup>d</sup> rent from that person this was deemed suff<sup>t</sup> notice that a former lease was made to him by their guardian & then acceptance of rent was deemed a ratification of the lease - for the possession of the third person was suff<sup>t</sup> to put them on inquiry. 1 Atk 490. 522.

And hence possession by a prior mortgage is suff<sup>t</sup> to put a person afterwards making a mortgage, <sup>on inquiry & through</sup> suff<sup>t</sup> notice of the prior mortgage.

And notice to any agent general the subject matter in question is notice to the person himself. 1 Ves 61. 9. 2 Ves 477. 485. Pow. 272. 2 Vern 574.

And this rule holds where one person is agent  
for both parties. 1 Ves 65. Pow: 274. 2 Vern 609.  
Presumptive  
Notice,  
Records.

But a judgment upon record is not deemed  
notice to any third person for this is not an ordinary  
common appearance. If then A has obtained a judgment  
against B & B afterwards mortgages to C. C is not  
deemed to have notice of A's judgment a subsequent mortgage  
may take over a judgment therefore - Pow: 283:5.  
1 Ch:ca: 35 107.

It is doubtful whether the doctrine of  
tacking is applicable in this state. for the records  
are deemed notice to all mankind. But yet  
there is an analogy in the English law which seems  
against this rule for there are Counties in Engl: in which  
mortgages do are recorded & yet tacking is allowed  
in these same counties. What purpose then do  
these records effect in Engl? They appear to be  
good for nothing.

1 Eq: ca 615. 2: Ds 609 Pow: 285:6.

Yet the English rule does not of course  
support the opinion that that a subsequent mortgage  
may take in these counties; the only case  
decided is that if a person having a mortgage  
lends money after a subsequent mortgage he may  
take but perhaps this is not suff: to support  
the rule that a subsequent mortgage may take  
where money is lent Pow: 287-921 & when the subsequent mortgage  
is recorded, or rather when the main mortgage is recorded -



Presumptive  
Notice

This rule holds  
however only  
in Equity  
vide title deeds

But a subseq<sup>t</sup> mortgage having ~~no~~  
actual notice of a prior mortgage if the prior  
mortgage is not registered & the subseq<sup>t</sup> mortgage  
is registered the second mortgage will <sup>not</sup> obtain  
a priority over the prior mortgage ~~they have~~  
~~only when registering is avoided~~ 600 712 287  
1 W 64. 3 Atk 646. 1 Str 664. 2 Atk 275.

For the subseq<sup>t</sup> mortgage here has the notice whl  
the registering was intended to give him.

But a subseq<sup>t</sup> mortgage registered is preferred  
to a prior mortgage not registered when actual  
notice is out of the question. 3 Atk 646 1 W 64  
2 Atk 275. Pow<sup>r</sup> 256:9. 2 Br P.C 425.

A purchaser for valuable consideration  
will hold ag<sup>t</sup> a prior voluntary settlement even  
tho the purchaser had actual notice of the  
prior voluntary settlement. on the principle  
that a voluntary conveyance is fraudulent  
as ag<sup>t</sup> subseq<sup>t</sup> purchaser as a mortgage is  
& as the prior voluntary settlement is void as  
ag<sup>t</sup> purchaser is void & notice of it is nly notice  
of a void conveyance

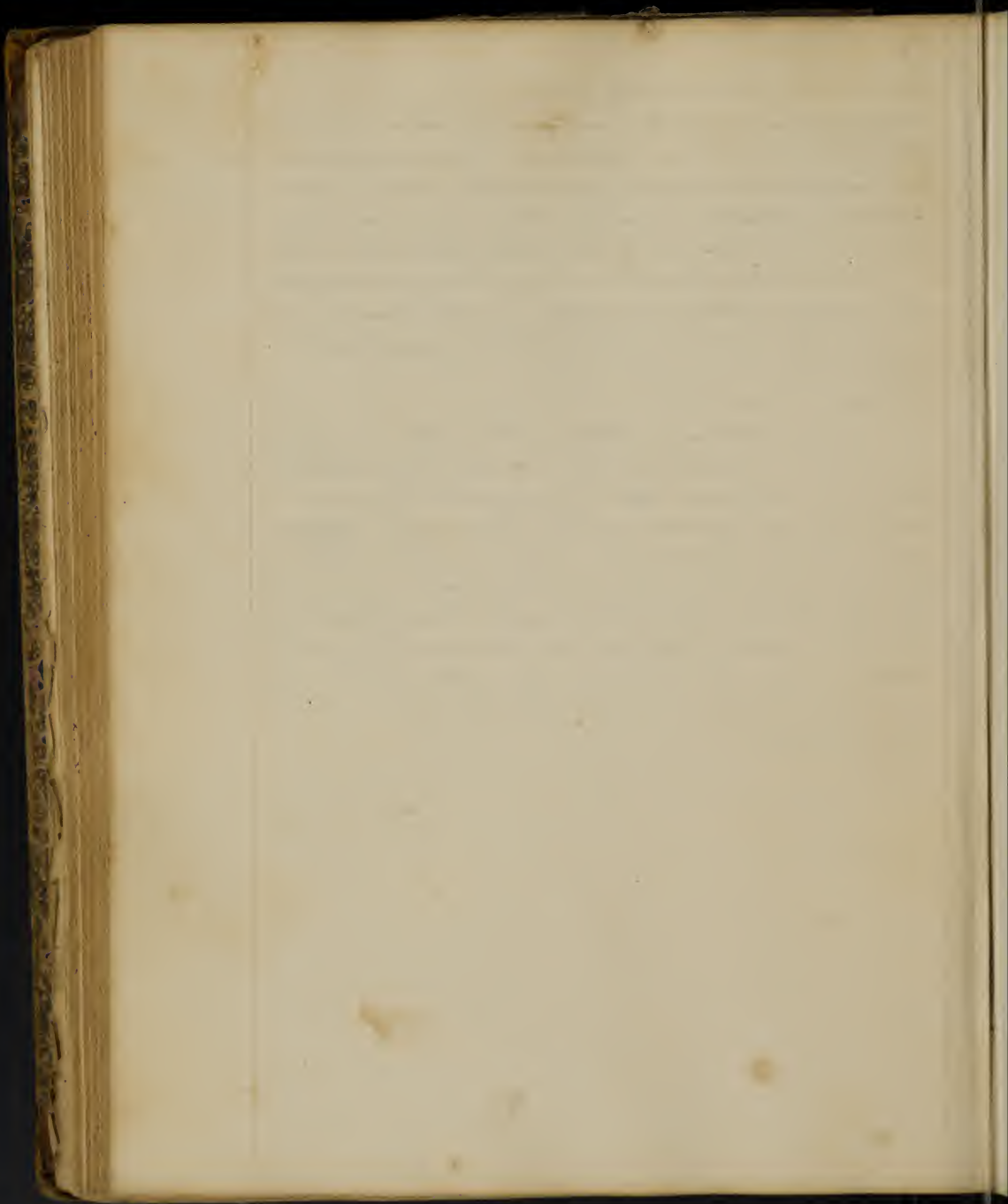
1 Eq ca 334. 600 280:711 9 East 59 2 Br 6 L 145  
2 New R 332. Sugd 432:3. Knowl

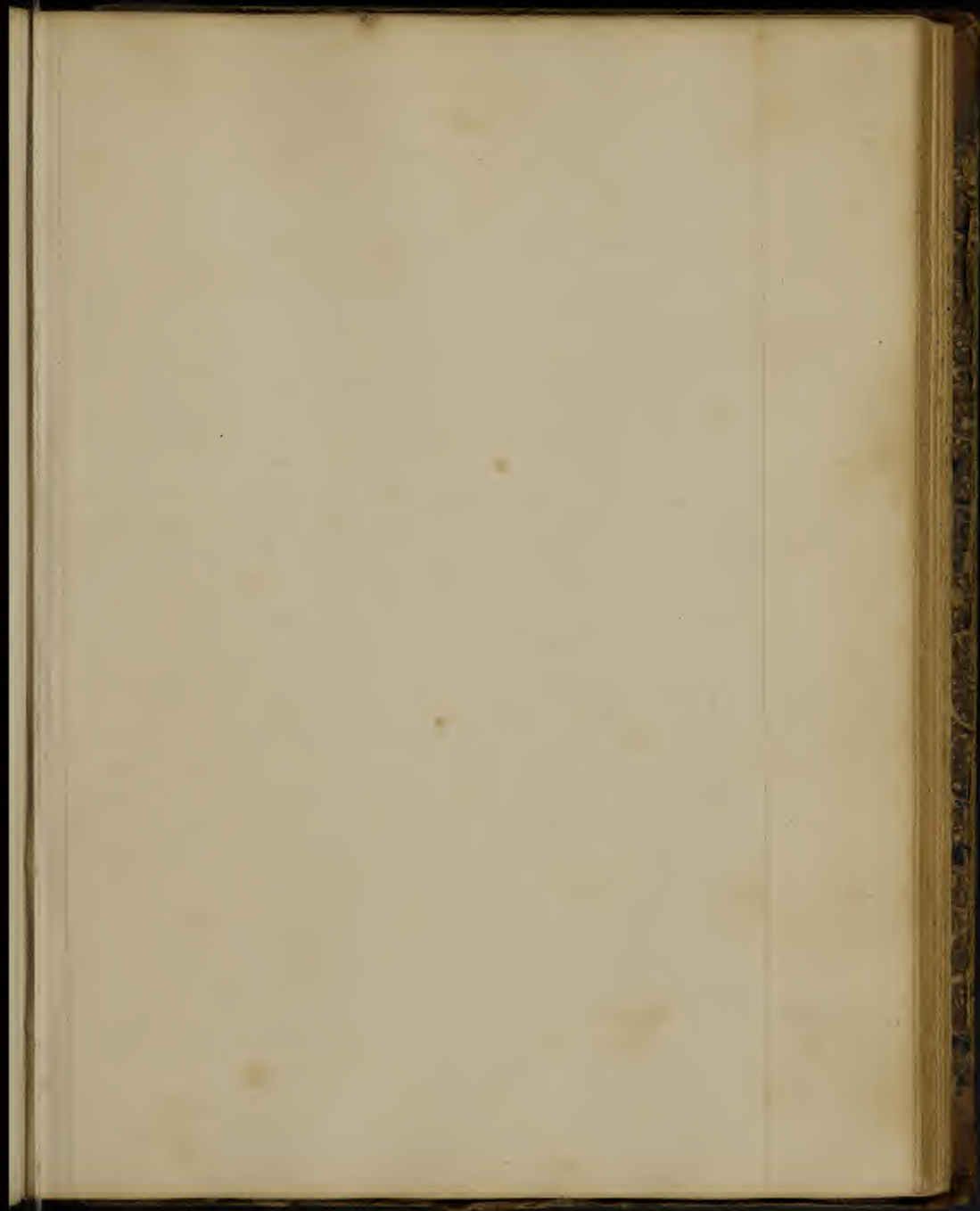
This rule has lately been much  
complained of & I think reasonably complained  
of. for the reasoning made use of begs the  
question for the conveyance whl is voluntary  
is made void ag<sup>t</sup> a sub<sup>t</sup> purchaser for value  
it so declares on the ground that the purchaser  
would be fraudulently injured by <sup>such</sup> conveyance  
without notice. But in the case supposed he  
has notice. 1 New R 332. Sugd 432:3.

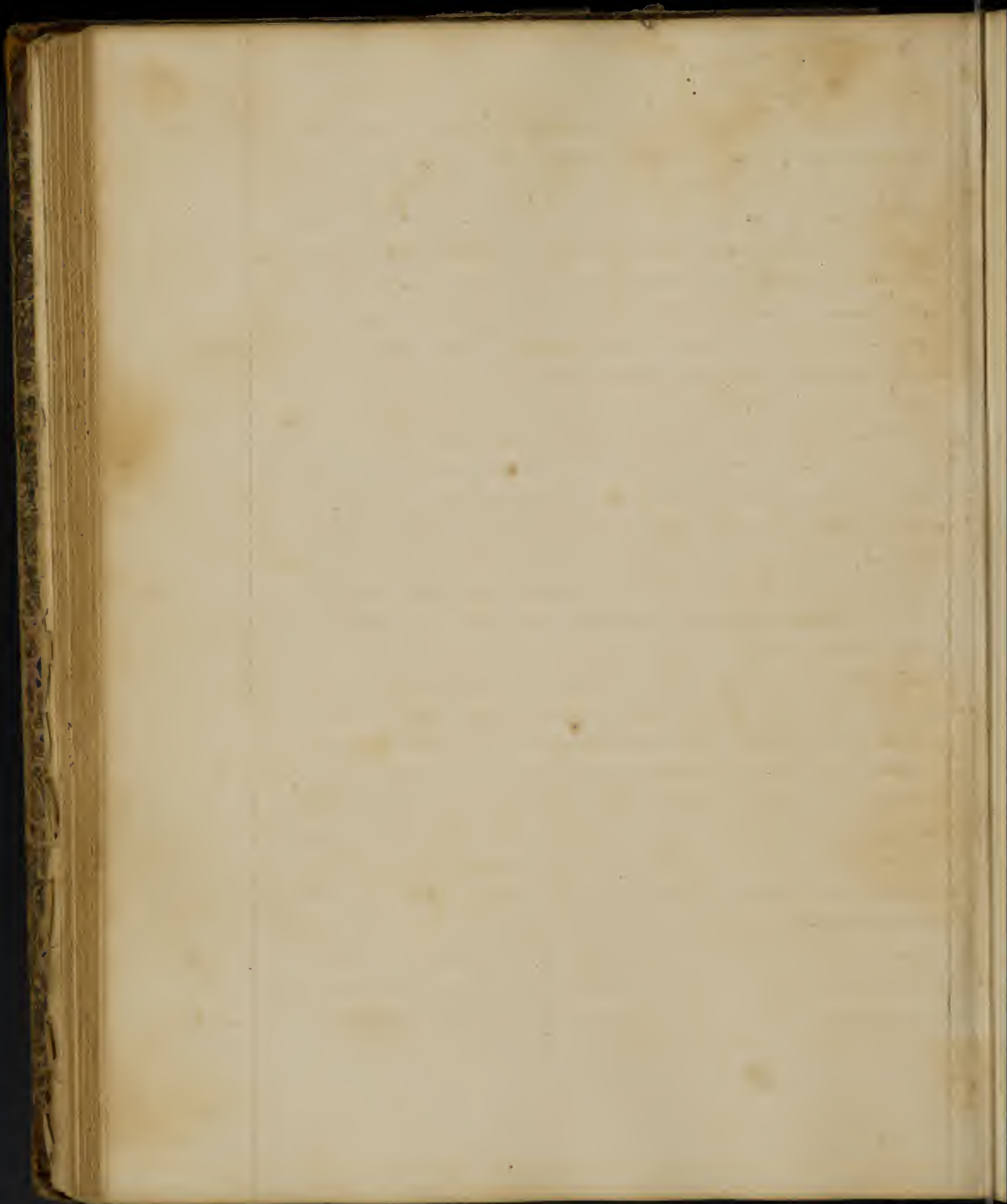


if one purchases with notice of a prior  
incumbrance & sells to another <sup>who has no notice.</sup> the second purchaser  
will hold as if his grantor had had no notice  
& he may tack to the legal estate. See in Ch. 51  
Fall 187. 1 Atk 571. Sugd 458. 1 Eq. ca: 331. 2 Br. 64 66.  
& 66 125. Rot 502 The principle is this, that he who has  
no notice holds precisely as if he held directly from  
the mortgagor & therefore stands upon the same ground  
as if he had purchased from the mortgagor with  
notice.

And if one purchases with notice of a prior  
incumbrance from one who has no notice of the  
prior incumbrance he is deemed to have no  
notice for he stands in the place of him from  
whom he purchased who had no notice (H.).  
The prior incumbrance cannot be injured by this  
rule. the assignee might have tacked & had  
all the advantages of an incumbrancer  
with notice the assignee by taking the same  
privileges does not injure at all the prior  
incumbrancer









Mortgages not on his death (Real Property 1710)

There was formerly much question whether the mortgages not should go to his heirs or to his executors at his death.

Pow<sup>r</sup> 297 1 Eq. ca 326

1 Vern 170

But it is now settled that the money due to the mortgages should be paid to his personal representatives unless the mortgagee manifests a definite intention as if he purchases the Equity of redemption or forecloses in which case it goes to his heirs. (If he has taken actual poss<sup>n</sup>.)

2 Vent 348. Hard 467 Pow<sup>r</sup> 304 479. 297

For it is a gen<sup>l</sup> rule in Equity that the fund wh<sup>ch</sup> has been diminished or charged by any debt shall receive the avails of that debt. Now as the mortgage is supposed to lend so much money to the mortgagor the personal fund has manifestly been diminished & therefore the mortgage debt must be paid to the personal representatives.

On a forfeited mortgage then the gen<sup>l</sup> rule is that the debt goes to the executors.

But if the debt is made payable to the heirs or executors the mortgage on the day of paym<sup>t</sup> may pay either to the heir or ex<sup>r</sup>. Yet tho' the debt is thus made payable yet if it is not paid on the day of pay<sup>t</sup> the mortgagor must at his peril pay to the executor. The reason of this distinction is that before forfeiture a br of equity has no jurisdiction & the mortgagor fulfils his agree<sup>mt</sup> by paying to the executor or heir.

Pow<sup>r</sup> 299. 1 Ch. Ca 283.

Mortgages.  
Mortgagee's inst  
on his death,

When on a fictitious mortgage the mortgagee pay, the debt to the ex<sup>r</sup> or the heir will be compelled to reconvey the mortgage to the mortgagor for he is no more than a trustee, he has (Bar 49. 50. Pout 300-2) the legal title

We have a st on this subject when the heirs are infants in which case the executor or the guardian of an infant heir may make an effectual reconveyance of the mortgage which will reconvey the legal inst (Tit 32. 519 St Bonif)

But there was no need of this st for upon common law principles the act of an infes are valid if that act is such as they may be compelled to do in a st of equity & therefore in this case their reconveyance would be valid.

3 Burr 1801

And if a mortgagor should by ignorance be on a fictitious mortgage pay the debt to the mortgagee's heir the heir will be compelled to pay over the money to the executor &c but if the heir is not responsible the mortgagee would be obliged to pay the debt to the executor notwithstanding payment to the heir, 2 Vent 348. Pout 302.

And tho' the mortgagor sh<sup>d</sup> die before Mortgage's  
fulfilment in wht case if the terms of the <sup>interest on</sup> condition are so the mortgagor may on the his death,  
day of pay<sup>t</sup> pay to the heir, <sup>even</sup> here the heir will  
be compelled to pay over to the executor.

2 Vern 357. Pow<sup>r</sup> 302

All these rules apply as well to an  
administrator as well as executor & this is the  
case even tho' no debts are to be paid; that  
it may be by him distributed according to  
the st of distributions. 2 Vern 367. 193. 1 Eq. ca 325  
Pow<sup>r</sup> 303. And in these cases if the heir has  
possession the Ex<sup>r</sup> may compel him to convey &  
deliver up the possession.

If after the mortgage's death after  
fulfilment the mortgagor conveys the Eq. of  
Redemption to the heir still the original  
mortgage's int<sup>t</sup> is in the executor & the heir  
in such case is virtually the mortgagor &  
he may redeem by paying to the executor  
the mortgage debt.

And the rule is the same where the  
mortgagor has foreclosed unless he had  
also taken possession for he has not before  
possession converted his debt into realty  
2 Vern 193. 1 Do 4. 170. Pow<sup>r</sup> 304.

That is has not sufficiently manifested an intention  
that the mortgage should go to his heir to induce  
a l<sup>y</sup> of equity to depart from their gen<sup>l</sup> rule —



Mortgages But if the owner of the incumbrance  
Mortgage's intended to consider the mortgage as real  
interest in estate it will be treated as real estate  
his death in whose ever hands the mortgage is 1 Vern 271  
Pow. 305. Thus if the mortgage makes an  
absolute conveyance + a redemption is  
after the death of the assignee sought for,  
the money will go to the heir for here the  
assignee clearly intended to realize,

If mortgage devises the land mortgaged  
a real estate on the death of the devisee the  
devisee's int goes to his heir & not to the  
executor. Thus if the mortgage devise they  
I give such a mortgage to A & B + his heirs  
the devisee's heirs take unless the devise manifestly  
a diff't intention

2 Burr 969 2 Vern 581. Prec in Ch 265. Pow. 306

If money secured by mortgage is  
articled that is agreed by the mortgage  
to be laid out in the purchase of land this  
money on the death of the mortgagee will  
go as land according to the stipulation  
of the mortgage. i.e. to the heirs genl  
special &c. As if A holds a mortgage of  
£5 for \$1000. he then enters into an agreement  
with his children &c that he will invest the  
money in land now this money will go  
precisely as the land if it had been purchased  
would have gone according to the stipulation  
3 P. Wms 217. Pow. 307.



If two persons make a loan with their interest of several funds & take a joint mortgage they are mortgagor's wife tenants in common & not joint tenants of the mortgaged estate & there is no survivorship.

For the mortgage is not regarded as a purchase of land but as a security for the debt. And if they should foreclose before the death of either & one dies the jus accrescendi does not take place for the intention governing throughout, they are not purchasers — 2 W 258. 3 P W 158. 3 Atk 703  
1 Bb 467. 2 Bb 55. 1 Vesey 15.

#### Inst of the mortgagor's wife.

A wife by joining with her husband in a fine to mortgage her husband's real estate incumbers her dower.

But her right of dower is paramount to that of the husband's mortgage of a husband's sole mortgage after marriage (1 Vern 294. Pow 311 313) Her right is prior it commences at the time of the marriage —

But a jointure settled on the wife during coverture on a mortgaged estate if it is merely voluntary will not be good agt a subsequent mortgage tho the mortgage had notice of the jointure. Cow 280. 711. 9 East 59  
2 Br Bb 148. 2 New R 332. Sugd 432:3.

If the jointure is in fee valuable consideration the rule w<sup>d</sup> be entirely differ

Interest of  
Mortgage's wife

If the husband before marriage gives the wife a bond to give her a certain sum of money if she survives him she surviving may redeem her husband's mortgage precisely as any bond creditor may redeem.  
See in Gh 307. 2 Vern 480 Powd 316.

I.E. she may redeem under the same circumstances in which any bond creditor may redeem.

If a husband lends money alone & takes a mortgage in the name of himself & wife she surviving will take the whole int<sup>l</sup> by survivorship provided the husband leaves suff<sup>t</sup> assets to pay his debts but if there are not suff<sup>t</sup> (personal) assets she must pay the debts & give up the int<sup>l</sup> in the mortgage she is postponed to creditors because this is a voluntary settlement.

2 Vern 683 2 P Wms 964 Powd 317: B 366.

Mortgages by Husband & wife  
of her freehold &c.

The husband by marriage gains no other int' in the wife's freehold than an estate during their joint lives or the life of himself if he survives, hence he cannot make a mortgage of the wife's estate of inheritance <sup>or freehold</sup> binding any longer either than their joint lives or the life of himself if he happens to be entitled to Courtesy. In any event the mortgage cannot be binding after husband's death & the rule is the same if she joined with him in the mortgage in any other way than by fine & recovery, for her dower in Engl. does not bind her, Co Litt 351a. 2 P Wms 127 Pow 337. 341.

But by joining with the husband in a mortgage by fine & recovery a mortgage may be made binding after his death Calb 41. 1 Eq. ca 61 Pow 338. 2 Vern 61.

Such is the rule of the com. law but in this state the wife's inheritance may be either aliened or mortgaged by the joint deed of hus. & wife. We have no express Stat for this but we have a statute taking it for granted that this rule is so. But still it is clear law. Rule the same throughout New England,

If the wife's land is mortgaged to secure the husband's debt his personal estate will be applied on his death in discharge of the mortgage tho' the mortgage was made by hus & wife in a fine & recovery & here by a joint deed 1 P Wms 264. 1 Vern 604. 689. Bow 343.

to be his, thus right to the inclusion of legators.



Husbands.  
right to  
wifes  
Mortgages.

And if she joins in encumbering her own real estate for the purpose of disencumbering the real estate of her husband she stands in the condition of a mortgage to the disencumbered land 2 Atk 384 Powt 346. & she is of course entitled to compensation out of the husband's assets.

The husband is entitled to the wifes mortgage precisely as he is to her choses in action. See Tit. Husb & wife.

If he reduces her right to possession during coverture it becomes absolutely his Prec in Ch 412 2 Vern 501. 1 Eq: ca 68. 1 P Wms 458.

The legal distinction is this marriage does not ipso facto make him owner of her choses in action but gives him a power of making them his own by reducing them to possession. But an assignment of the wifes mortgage is not a reduction of it into possession unless the assignment is for valuable consideration.

If he assigns without consideration the assignee has no higher claim to the trust than the husband would have had had he not assigned.

2 Vern 401. Prec in Ch 115. 2 Ves 170 The voluntary assignee always stands in the same situation as the assignor.

If the husband's creditors get possession of the wifes mortgage so that she can have no relief but in equity that Ct will not interfere to take the mortgage from them - for the equity is said to be equal 1 P Wms 458 3 P Wms 197. Powt 357-363.



But if in this very case if the wife had kept possession of her mortgage a Ct of equity would not interfere to take it from her. for the equity is equal & she here has possession. 1 PM 4352. 459  
2 M 316. Pow 359-363.

Mortgages.

But equity will interpose ~~not~~ the wife in favour of a specific assignee of the mortgage if the assignment is for valuable consideration for the assignee has a superior equity to the wife & besides that the legal title 2 Vern 270. Pow 316  
365

And an express agreement by the hus. to assign 2dly the wife's mortgage as security for a debt. 2 PM 4374 with a delivery of the mortgage deeds will bind the wife. Pow 364. 6.

Out of what mortgages are to be redeemed on the mortgagor's death

It is a gen'l rule in Equity that the fund whh has been increased by the contracting of the debt shall be charged with the payment of the debt in the first instance & hence on the mortgagor's death his personal fund is first to be applied to the payment of the mortgage debt This is the rule whh the law prescribes when the mortgagor has manifested no intention on the subject

Salk 449. Salk 654. Pow 368-410. 416. 3 PM 4358  
Prec in Ch 61. 6 Br PC 470.

Out of what fund the debt the heir at law may indeed be sued matgag on that bond yet if the executor has assets, debt must he can be compelled to pay the debt & to be paid repay it to the heir if the heir has been obliged to pay. (26)

The same rule applies to the devisee as to the heir 1 Atk 487. Prec in Ch 477. And the devisee may compel the heir also to discharge the matgag debt.

And if the mortgagor bequeaths his personal estate & devises his real estate to another the devisee of the matgag may call upon the legatee to pay the matgag debt.

But I could entertain some doubt whether this is true agt any other than residuary legatees. Prec in Ch 61. 477. Talb 54. 2 Vern 701 1 P Wms 693. Pow 385. 6. 374.

Now the genl principle on which the mortgagor's heir is entitled to call on the personal fund is that the debts must first be paid out of the personal fund but when the personal estate is itself derived specifically the legatee are to be considered creditors.

But the heir at law or devisee is never entitled to the aid of the personal fund to the prejudice of the creditors even simple contract creditors of the mortgagor. 1 P Wms 693. Talb 53. Pow 385. 6.

These rules are however subject to the direction  
of the mortgagor his intention must govern,  
1 Ves 51. Pow 574

And tho' the real estate is by the testator  
expressly charged with the payment of debts even  
in this case the real estate is not charged unless  
the personal estate is exhausted the only effect  
is to make the land subject to simple contract  
debts if the personal estate is not suff.

But if instead of such a genl direction  
he directs that his real estate shall be sold for  
the pay<sup>t</sup> of his debts. the personal fund is not  
first to be applied & in this case -

1 Ves 51. 1 Lev 213.

Prec in Ch 451. 2 Vern 718. 1 Eq: ca: 271

The heir or devisee of the mortgagor  
is not entitled to the personal fund of the  
mortgagor if the personal property is  
specifically devised

A legacy is said to be specific  
when the property is specifically marked  
out. 1 P & W 693. Powd. 386. 385. 391.

But tho' the mortgagor devises his real  
estate with the words 'with all the incumbrances  
thereon' here if no other words are used showing  
an intention that the devisee should take cum  
onere the personal fund will be taken to  
pay the mortgage debt. In these words are  
only words describing the property itself 2 P & W 386  
1 Br 643 352. Powd. 392 & 3.



Mortgage

And where there appears a clear positive  
intention on the face of the mortgage will that  
fund redeem? the devise shall hold the estate free from  
incumbrance even the real estate in the hands  
of the heir will be applied to discharge the  
devisee estate Pow. 393. 398. 405. 2<sup>nd</sup> 407.

All these rules depend upon the intention  
of the testator.

If the mortgagee sells a person  
his int<sup>y</sup> to another the heir of the assignee  
on his death has no claim on the personal  
fund to pay the mortgage debt for here  
the personal fund of the assignee is not  
increased by the purchase of the mortgage's  
int<sup>y</sup> but rather diminished by it

1 Bro Gk 101. Pow. 410.

1 Bro Gk 454. Pow. 412.

And this is the universal rule  
where the owner of the equity of redemption  
at the time when the question arises is not  
strictly the debtor to the mortgage.

Where therefore the mortgagee's heir  
devisees the land the devisee is not entitled  
to the personal fund of the heir to pay  
the mortgage debt for the personal fund  
of the heir was not increased by the mortgage  
1 Br Gk 454:55. 1 P M 347. Pow. 412:16.



Interest of money secured by mortgage  
lawful int<sup>t</sup> in Eng<sup>d</sup> is 5 p<sup>r</sup> cent by 12 Ann

" " in N Eng<sup>d</sup> is 6 p<sup>r</sup> cent

Now as the reservation of unlawful int<sup>t</sup>  
avoids the contract in wh<sup>l</sup> it is reserved so it  
renders void all securities for that debt

A mortgage therefore wh<sup>l</sup> is made to secure  
an usurious contract is void.

But notwithstanding what Attk says 3 Atk 154  
the taking of unlawful int<sup>t</sup> does not ipso Pon<sup>t</sup> 421  
facto make the mortgage to secure the contract  
in wh<sup>l</sup> unlawful int<sup>t</sup> is taken void for it  
is only some evidence that the original  
contract was <sup>usurious</sup> void, but unless the original  
contract was usurious the mortgage cannot  
be void. The rule concerning the mortgage must be the same as  
concerning <sup>the contract</sup> It is said to have been held by Lord Hardwick  
that if a contract were made in Eng<sup>d</sup> for a mortgage  
of a plantation in West Indies no more than the  
legal int<sup>t</sup> in Et Britain would be allowed

But I question this rule see Tyl Henry  
3 Atk 717, 1 Ves 425, Pow 421, Or at least he must  
suppose that the contract is to be performed in England,

A distinction is taken in Chancery  
between an agree: to pay 4 p<sup>r</sup> cent with a clause  
that if the debt is not punctually paid Prec in Ch 160  
the int<sup>t</sup> shall be 5 p<sup>r</sup> cent in wh<sup>l</sup> case Darn 481  
a Ct of Chancery will not enforce the 3 Atk 520  
additional one per cent. & an agree: to pay 2 Ann 316 254  
5 p<sup>r</sup> cent with a clause that if the money is 3 Bl 432.  
punctually paid the int<sup>t</sup> shall be 4 p<sup>r</sup> cent (2 Ves 134 conf)  
in wh<sup>l</sup> case the Ct will enforce the contract Ord 37.

But this is a distinction with a difference 3 Atk 449  
The two agreements are to precisely the same Pon<sup>t</sup> 424.  
thing.

Mortgages  
Interest.

If compound int is reserved the comp int will not be enforced either in law or in Equity. See in Blk 116. 2 Atk 331. 1 PM 652. Pow. 439. 442.

But if the mortgage assigns his int with the consent of the mortgagor all that the assignee pays principal & int become one consolidated debt wh will draw int 1 Vern 169. 2 Vern 135. Pow. 426:7. For this is in nature of an agreement between the mortg & the assignee that the latter shall pay the debt of the mortgagor. But if the assignment is made without the concurrence of the mortgagor the assignee can never enforce the pay of int on the int paid by him to the mortgagor 3 Atk 271. 1 Vern 168. Pow. 427. For if this were the case the creditor without concurrence of his debtor might convert int into principal. But the first rule does not hold where the assignment is merely colourable. for if the assignment is merely for the purpose of subjecting the mortgagor to compound int even with the mortgagor's concurrence it will not draw 1 Eq. ca. 329. Pow. 426) compound int is at risk in such case & a Ct of equity will not compel the mortgagor to pay more than simple int on the original debt.

When the mortgagee assigns, the acct taken Interest.  
between the mortgagee & his assignee does not conclude  
the mortgagee 1 Vern 168. 2owl 426. I.E. where the  
mortgagee is not a party to the acct it is then  
inter alios acta. If he is a party he is  
concluded unless he can impeach the acct for fraud  
or mistake - But the report of a master in chy  
computing the inst on a mortgage makes that  
inst principal from the time of the acceptance  
of that report by the Ct. for this report is  
in the nature of a judgment 1 P Wms 478. Rec in 6500.  
1 Eq: ca: 530. 1 P Wms 453. 480. 376. 3 ack 722.  
2 Eq: ca 530.

But a master's report agt an infant  
on a bill to foreclose does not regularly  
carry inst on inst. for the ground of the  
former rule is that neglect is suffered by  
the Cte but laches are not imputed to  
infants. 2owl 432:3. 2 Bro PC 56. 2 Vern 392  
2o Litt 5402. 2d Raym 25. 2 Vern 392.

But where an infant is Plf to  
a bill in chy to redeem the account of  
the master carries inst on inst. for as he  
requires equity he must do equity  
4 Br B. 6447. Powl 334:7



And if an infant entitled to an equity  
of redemption agrees to pay *inst* on *inst* &  
by that means obtains a benefit to himself  
the infant may be compelled to pay *inst* on  
*inst* C. 315 a 1 Eq: ca: 287. 1 Pow: on  
contr: 487: 8.

Yet a mortgagor's merely signing  
an acct does not convert *inst* into principal  
for this is merely an agreement that this  
account shall be considered correct—  
1 P. Wms 652. Pow: 439.

An agreement after *inst* has actually  
accrued to the mortgagor to pay *inst* upon  
that *inst* is binding both in equity & law  
2 Lalk 449. 2 Atk 331. Pow: 441: 2.

A tenant in tail in possession is  
never compellable by the remainder man or  
reversioner a issue in tail, to keep down the  
*inst* on a mortgage of the estate tail for they  
are in the power of tenant in tail 1 Ves 479  
477: 50. Pow: 443-5. 3 P. Wms 235.



## Mortgages.

If tenant in tail of an estate of reversion is an infant with his guardian in possession is compellable to keep down inst because the infant cannot bar the remainder - man so with special licence from the crown  
 2 Atk 507. 2 Atk 427. 1 Vesey 477. 50

But if tenant in tail in possession does keep down inst the remainder man so will have the benefit of it. 1 Ves 477. 1 Br 6218.

Because the inst of the remainder man is deemed so remote that he is not to be compelled to reimburse.

If the first mortgage enters & afterwards permits the mortgagor to take the profits inst payg. inst the profits in favour of a second mortgage will be applied to the debt of the first mortgage for otherwise the second mortgage might suffer  
 Prec in Chy 30. 1 Vern 270. Cow 453. 468. 3 Mac 136

Where a bond is given to the mortgagee - as security as is usually the case any holder of And may the bond having become fairly & legally repayed <sup>collect the</sup> whole debt. if it may receive the rents & profits of the estate

But the lawful holder of the mortgage deed has authority to receive no more than the inst 2 Atk 158  
 1 Vern 150. Prec in Chy 209. 1 Ey: ca 145. 1 Vern 453. 4

The holder of the bond must however account for the profits to the mortgagee

If the mortgagee on tender made after  
foreclosure refuses to accept he loses inst on the  
debt from that time provided the mortgagor gives  
6 mo previous notice that he will pay on a certain  
day & actually tenders the money on that day.  
1 Eq: ca 318. 19. Pow. 154. 5

To give the tender the effect of barring  
inst the mortgagor must make oath in the English  
practice that the money has since the tender  
been always ready to pay the money <sup>due</sup> & that he  
has made no use of the money since the tender  
D 11 m 378. Pow. 455. 2. 11

The money due on the mortgage is  
regularly to be tendered to the mortgagee in  
person unless some place of pay is appointed  
in the contract. The rule is the same as if the  
money was not secured by mortgage Co Litt 216  
2 Eq: ca. 610. Pow. 456. 3 Ack 90.

Mr Pow. lays down the rule that the rate  
of inst on a mortgage may be altered by a subsequent  
parol agreement. But there ought to be some  
qualification to this rule for it is a principle  
of the law that a written contract cannot be altered by a  
parol agreement. The rule ought to be that where the  
mortgagee brings a bill to foreclose the mortgage  
may prove this parol agreement but this does  
not alter the agreement it only instructs the  
conscience of the Chancellor to foreclose the  
mortgage only on the mortgagee receiving  
the agreed rate of inst Pow. 460. 2. 6 Br F. 6580

Method of accounting

A mortgage being only a pledge & not an alienation the mortgage cannot take the profits until & unless he takes possession & while the mortgage remains in possession he accounts to the man for he pays interest instead of accounting. Pow. 51. 464. 3 Atk 244. 2 Bb 107. 509 266

But the mortgage must account for the profits during his possession & they must go to the discharge of the debt. 1 Vern 4, 6 2 Atk 554. Pow. 464

If the mortgage in possession manages the estate himself he has no allowance for his care & trouble, but this means no more than that he has no claim for salary wages &c but undoubtedly his time labour &c is to be taken into acct in ascertaining the net profits & the same rule holds even tho' the mortgagee agrees to pay a salary because I suppose it tends to oppression & complete justice is done to the mortgagee if he is to account for nothing more than the net profits 2 Atk 120. Pow. 466

But if he employs a skilful agent he is entitled to charge a salary but this amounts to nothing more than that he may charge reasonable wages for the labour & care of an agent.

1 Ver 516. 3 Atk 511



If the mortgager with consent of  
the mortgagee he is still answerable for the  
rents & profits if being in poss. he assigns  
the mortgaged estate to a person unable to  
pay for the profits 1 Eq. ca. 328. Pont 467.

The mortgager however is to acc<sup>t</sup>  
to the mortgagee only for the actual profits  
rec<sup>d</sup> unless it appears that thro' fraud or neglect  
he might have rec<sup>d</sup> more. He is not of course  
then obliged to acc<sup>t</sup> for the greatest possible  
profits 1 Vern 45. 476. 1 Eq. ca. 328. 3 Buc 657.  
Pont 457. for the mortgager is supposed to be obliged to  
take possession for the purpose of securing his int<sup>l</sup> & therefore  
is ought not to be obliged to account strictly.

But if the first mortgager takes  
possession & keeps other creditors out he is  
obliged in their favour to account for all  
the profits which he might have been made  
with all reasonable care. The reason of  
this distinction is that it is not the fault of the  
subsequent incumbrances that the first is obliged  
to enter for the purpose of securing his interest -  
Duc in 6h 30. Pont 468. 1 Vern 270.

But he is not bound to this extent  
even in favour of subsequent incumbrances until  
he has notice of the subsequent incumb<sup>t</sup> Pont 468. 9



Where there are several mortgages  
a subseqt mortgage may recover in payment of  
the mortgage for the mortgage is estopped to  
deny that a subseqt mortgage has the legal  
title. If therefore the first mortgage permits  
the mortgagee to remain in possession & keep out  
other mortgages the first mortgage is chargeable  
with the rents & profits from the time in which the subseqt  
mortgage might have obtained possession had he not been  
prevented by the first mortgage -

1 Vern 267. Dowd 469. 3 Bac 658. mort.

Where a mortgagee in possession has  
assigned his mortgage & a bill is brought in  
equity to redeem age the assignee the mortgagee  
must be made a party to the bill for he must  
be heard in accounting. 1 Eq. ca 594.

Where there are several successive mortgages  
an acct stated between the first mortgage & the  
mortgagee will be binding on subseqt incumbrancers,  
unless it can be impeached for fraud & collusion  
1 Eq. ca 12. 1 Ch. ca. 299. 3 Bac 659. mort. Dowd 471. 2

o But an acct between the mortgagee  
& assignee will not conclude the mortgagee  
for here the mortgagee's trust is not represented  
but in the former case the trust of the subseqt  
mortgagee is virtually represented. Dowd 472

Where there have been several assignments of the mortgagee's trust the last assignee is not bound to acct for previous rents & profits but they will be taken to go off agt the trust. because in such case it is impossible to make out the acct.

Pow. 472:3

There are two modes of making out the account between mortgaga & mortgages

The one by making annual recks is by applying each year the annual surplus of profits above the trust to the sinking of the debt. (this reduces the debt in the same manner as annual trust increases it)

The other mode is by making all the rents & profits into one aggregate sum & all the trust into another. (this sinks the debt as simple trust would increase it.

(As to the application of these <sup>modes</sup> rules the rule is

If the yearly rents of the land greatly exceed the annual trust of the debt the former mode is adopted. if not the latter is not bound to make annual recks. but some discretion is in the master in the last case 2 Atk 534.

Pow. 474.

### Foreclosure

After foreclosure on a bill brought by the mortgagee the Ct of Equity will decree that unless the mortgagor will pay the debt within a time limited by the decree itself all the mortgage's must will be forever foreclosed & extinguished  
Pont 475.

When however the mortgage is of a reversion the Ct will order a sale of the estate if not redeemed within a limited time. This is never done when the mortgage is of an estate in possession the reason is that in case of a reversion the mortgagor may never be able unless it is sold to derive any advantage from the mortgage Pont 475 510.

If one mortgage is made to several parties all the mortgages must be made parties on a bill to foreclose. otherwise the business would be entangled so also if the mortgagor assigns his debt to A B & C A B & C must be parties to a bill to foreclose  
Br Ch 368. Pont 475:6 If part refuse to join the remainder may make those who refuse defendants. The same rule holds of several assignees of the mortgage

A foreclosure can never be decreed until after forfeiture for a foreclosure is an extinguishment of an Eq: of redemption but the Eq: of redemption does not exist until after forfeiture—

1 Vern 132. 2 Ventr 365 Pont 31. 54. 137 476.



It is laid down that on a bill to foreclose the title of the mortgage cannot be investigated but this rule is very blindly expressed —

What is meant by this rule is this that if the title of the mortgage is defective it will not be aided by a C<sup>t</sup> of Equity on a bill to foreclose & Chica. 244 Pow. 476.

If then the mortgagee's deed is defective in requisites he must bring a bill in Equity to compel the mortgagee to rectify the deed & a C<sup>t</sup> of Equity will enforce such a rectification & then when the deed is made perfect a bill to foreclose may be brought & maintained.

And a mortgagee may at one & the same time pursue against the mortgagee three diff<sup>t</sup> actions & the pendency of neither of these suits will abate the other. viz he may have an action of debt or assumpsit — 2<sup>d</sup> He may have an action of ejectment & 3<sup>d</sup> He may have a bill to foreclose

2 Atk 344. Doug 401. Pow. 477.

In this state if he recovers on his action of debt he may on his execution levy on the land mortgaged & this gives him in law & in Equity a complete title to the land. But in Engl<sup>d</sup> this cannot be done. In this case in this state the land must be appraised as if it was unincumbered. for by this levy he acquires a complete title to <sup>the</sup> land but if an execution <sup>is</sup> in favour of a stranger the appraisal is only of the eq<sup>y</sup> of redemption for he only acquires a title to the eq<sup>y</sup> of redemption —



Wherever plain mortgage would be the  
consequence of a foreclosure a lot of equity will not serve  
a foreclosure for when a mortgagee having notice of  
a prior voluntary family settlement bought in of the  
trustee the legal estate in this case the lot of equity  
will leave him to his remedy at law & in law the  
right of redemption forever remains in the trustee  
or in those who claim under the family settlement  
Salk 580 2 Vern 271 Pow 277 471 473 474

The mortgagee in this case was guilty of  
inducing the trustee to violate their trust & convey  
their estate to him.

And I suppose a lot of equity will never  
decree a foreclosure when a mortgagee loans  
money on the security of an estate which has  
before been voluntarily settled for the benefit  
of the family knowing of this voluntary settlement  
at the time of loaning the money

If the mortgagee applies to redeem  
& the lot of equity decrees that the mortgagee may  
redeem or before a certain day if that day elapses  
without redemption the decree will operate after that  
time as a foreclosure. The above rule is doubtful  
in Pow 474 the rule is thus. "If upon a reference  
to a master to see what is due for principal interest  
& costs the mortgagor does not redeem the mortgagee the  
court will on his application dismiss the bill as against  
him which is equivalent to decreeing a foreclosure"  
(Pow 435. of the 1<sup>st</sup> edition)

Salk 587  
Pow 474

If the mortgagee's heir brings a bill to foreclose it is a good cause of demurrer that the mortgagee's personal representatives are not made a party for they are entitled to the money due on the mortgage debt. & the Ct on the hearing will dismiss the bill with demurrer if the Exor is not joined.

But if the mortgagee's heir has obtained a foreclosure it will be good tho' the mortgagee's executor is not a party provided the heir pays the debt to the personal representative  
1 Vern 367. 2 St 66. 50m<sup>e</sup> 480.

But the mortgagee's executor must not be party to a bill for foreclosure if the mortgage is of a freehold. but if it is of a term for years the executor must be a party to a bill to foreclose 3 D Wm 383, note Post 479. 80.

For the mortgage is not bound to make any other person debt than the owner of the equity of redemption & the fact that the mortgage debt is to be paid by the executor is a matter entirely between the executor & heir of the mortgagee.

If the heir of the mortgagee does not pay the debt to the executor & when the executor was not party, ut supra the executor may compel the heir to convey the land to him 2 Vern 67. 193. 367. 189ca 328 Post 303. 408. or 480.

On a decree foreclosing the eq. of redemption unless the money is paid within a certain number of months the months are computed as calendar months. Pow. 481. 2 Eq. ca: 605.

A decree to foreclose a tenant in tail of an eq. of redemption binds not only the issue in tail but the remainder man & reversioners because the mortgagee shall have all the rights of the tenant in tail & the tenant in tail had a power to bar remainder man &c. (Pow. 481) and this is true whether the remainder men be made parties to the bill or not.  
10th Nov 17

But a decree of foreclosure does not include the remainder in fee where the mortgage is of an estate for life unless the remainder man is made party to the bill to foreclose  
2 Atk 101. Pow. 483

~~But a decree of foreclosure does not include the remainder in fee where the mortgage is of an estate for life unless the remainder man is made party to the bill to foreclose~~

If there are several incumbrances & some of them are made parties & some not the decree of foreclosure includes only those who are made parties to the bill 21 M. 518  
Pow. 483. 2 Vern 518. 663. 185. Pow. 492. 3 Cl 1304



Where the mortgagor is divorced the decree alone may bring a bill to foreclose & he need not make the heir or executors parties for they have no int<sup>t</sup> in the debt.  
1 Eq: ca: 318. Pow<sup>r</sup> 485 1 Ch 1630

An infant may be foreclosed by a bill brought for that purpose but in such a case the decree is that "this decree is to be binding on the infant unless he shall in 6 months after being served with process for that purpose show good cause to the contrary."  
2 Vern 392. 342. 479 1 Do 295 Prec in Ch 185  
2 Vesey 23. Pow<sup>r</sup> 485:6 432. 3 Deane 1248

In the practice of this state the decree ag<sup>t</sup> an infant is precisely in the same form as other decrees (but he has of course 6 months after he becomes of age to show cause ag<sup>t</sup> the decree). in the English practice a new decree is made unless the infant shows cause at supra but here no new decree is necessary for the former decree becoming absolute in such case by the terms. But in Engl<sup>d</sup> when he does show cause he may on motion make a new defence as if there were no decree.  
2 Atk 523. 1 P Wms 504. 2 P Wms 401. 3 Br & P 6301  
Pow<sup>r</sup> 486.



✓ The process for him to show cause is  
to be served on his coming of age the process  
is a judicial writ like a scire facias — Post. 486 —  
3 Bl 369. 3 Buz 148 "infancy" no such process  
in Court.

But it is not to be understood that  
he can set aside the decree merely because he was  
an infant. he cannot therefore plead infancy.  
nor is he by any means entitled to rescind  
as a matter of course after becoming of age.  
This period of 6 mo. is allowed for him to show  
some error or injustice in the decree & he must  
show some cause w<sup>h</sup> would have prevented a  
decree in favour of an adult at the time when  
the decree was made. If he shows such a cause  
the decree will be opened by the court.  
3 P. Wms 352. Post. 487: 9: 90

But if a feme sole or her ancestor  
mortgaged land & the equity of redemption vests  
in her during coverture a decree upon her is  
peremptory she has no day after discovery to  
show cause. On acct of the inconvenience  
of the thing as no body knows how long her  
husband may live & besides she is under no  
natural disability as an infant is & it  
is presumed that her husband will take care of her interests.  
3 P. Wms 352. 3 Atk 712 10 Co 43 a Post. 488: 91 1748 305  
Hobart 95

But after discovery if there is  
any injustice done to her she may show it &  
obtain an opening of the decree

2 DM 450 3 DM 4238 Pow 491

And there are cases in which a foreclosure  
may be opened in favour of any debt  
as if the P & F has been guilty of any unfairness  
in obtaining the foreclosure & therefore where a  
mortgage obtained a foreclosure pending a  
suit by the creditors of the mortgagor a  
bankrupt for the sale of mortgagor's trust,  
on application of the Cr the Ct opened the  
decree. because the pending suit was calculated  
to do complete justice to the mortgagor.

9 Mch 153. 2 Eq: ca 600 609. 2 Br B.C 544 Poul 491  
499

In another case where the mortgagor had  
obtained a foreclosure after the Cr of the  
mortgagor had tendered to the mortgagor the  
payment of his debt the decree was opened on  
application of the creditors to the court  
Poul 492. 2 Vern 601

It was said in the last authority  
that a decree in such case would not be opened unless  
the Cr gave notice of their debt

Where a foreclosure is opened in favour of a subseq<sup>t</sup> incumbrancer the first mortgager is allowed all his expenses in obtaining the foreclosure. But this holds I trust only where the foreclosure is obtained with any unfairness—  
2 Vern 185. Powt 492.

And upon various special circumstances a decree will be opened where there was no unfairness as where the mortgaged land is much greater in value than the debt & where the mortgager is the embargement  
2 Eq. ex 605. Barna 221. Powt 493 H.

And where the mortgager is prevented by any inevitable circumstance from paying on the day limited by the decree the foreclosure will be opened  
Powt 494. 1 Ch R 655. 1 Eq ex 63.

But it seems that a foreclosure cannot be opened in favour of a man volunteer by whom is meant one who has obtained the equity of redemption with consideration. 1 Eq. ex 317  
Powt 494. 1 Ch R 617.

If the first mortgager on obtaining a foreclosure assigns a subseq<sup>t</sup> mortgager deises his deed to the mortgager, the foreclosure is also facts opened in favour of the subseq<sup>t</sup> mortgager for the second mortgager's deed is an estoppel ag<sup>t</sup> the mortgager's saying that he has foreclosed ag<sup>t</sup> the mortgager. 2 Vern 235. 1 Do 148. Balk 276

4-10-1832  
A foreclosure may be opened by operation of law as if the mortgagee after obtaining a decree of foreclosure sues the mortgagor on the debt for which the mortgage is given he ipso facto opens the foreclosure. 1 Eq: ca: 317. Pout 496. 2 Br 36119.

But in this state it has been decided that a foreclosure with possession taken satisfies the debt & that a suit cannot be afterwards brought on the debt for which the mortgage was made.

1832.  
1832.

1832.

This rule I should doubt whether it is now overruled, but since it is so that the old rule is revived & when a mortgagor has for a number of years acquiesced in a decree of foreclosure they, non fact will in genl prevent an opening of the decree of foreclosure. If there is any reason for opening a decree it ought to be asserted in season 2 Eq: ca 177 579 Pout 499 500 110 1 Br 36414. 2 Br 111 3 Br 315.

In Engl? the practice is if the money is not paid within the time limited in the decree for the  $\text{C}^t$  to make a further decree making the former absolute Pout 479. 505. This is never done here for the former decree here becomes absolute with any subsequent decree -

Mortgagee in a suit of the mortgagee to open a foreclosure by taking possession of the property & by the mortgagee's intervention in the suit the mortgagee is not bound to open the foreclosure. 4 Br 36119



Estates in severalty & joint tenancy (Real Property N. 12)

I have heretofore been writing about estates as regards the quantity of interest & the time of enjoyment. I now come to consider the number of owners.

An estate held in severalty is one of which there is but one owner during the continuance of his interest  
2 Woodes 112. 2 Bl 6179.

An estate in joint tenancy is an estate in lands or tenements so limited to two or more persons & it may be limited in fee simple, fee tail, for years, for life or at will Litt 5277  
2 Bac 118 "Of Joint Tenants" 2 Bl 174 2 Woodes 124

As to the creation of this estate it must be universally created by purchase in the gen'l acceptance of that word. It may then be created by deed by devise by fine recovery & indeed by any species of common assurance. 2 Bl 180  
2 Woodes 124 It is always created by act of the parties never by act of law.

If an estate is given to two or more persons without words denoting an intention that they should not hold as jt tenants they will hold as jt tenants. But if land is limited to two persons to be held the one half to the one & the other to the other the persons taking will hold as tenants in common — — — — —  
2 Bl 180 193 Litt 5298

Joint  
Tenancy

The properties of this species are derived from its unity & its unity is fourfold viz of time, of interest, of title & of possession

& if any of these unities are wanting the estate will not be a joint tenancy.

2 Woodes 129

2 BL 150

1 Ed Ray 312

<sup>2 Woodes</sup> They must have one & the same quantity of int commencing at one & the same time & by the same conveyance & held by one & the same undivided possession.

1. One jt tenant cannot have one quantity of int & one another for in this case tho' they hold by all the other unities they are not jt tenants 2 Woodes 127. Litt 5277. 2 BL 150:1

2 BL 157

2. By this unity is required not merely similarity but identity of interest. An estate to A for life remainder to B for life here the quantity of int is the same but there is no identity of int. But if an estate is limited to A & B for <sup>their</sup> lives they are jt tenants & each has an estate in the whole for their joint lives & the survivor the entire estate for his own life Blackstone lays down the rule in this case diffusely & incorrectly

If an estate is limited to A & B & their heirs they are joint tenants <sup>of the inheritance</sup> & the estate will go entire to the heir of the survivor Litt 5280 2 BL 157

If an estate is limited to A & B for their lives joint tenancy  
& to the heirs of A. "according to BL they are jt  
tenants for their <sup>respective</sup> lives & on the death of both the  
estate goes to the heirs of A". But I & G say they  
are jt tenants for their jt lives & if B dies first  
A has not an estate for the life of B or of himself  
for the life estate is merged. But if B surviving  
A, they indeed have a jt estate for their respective  
lives. 2 BL 181. 211 Words 127. Litt 5285.

If a grant is made to two men for  
life & the heirs of their bodies or to two women  
& the heirs of their bodies or to a man & a  
woman who cannot legally intermarry & the  
heirs of their bodies they are jt tenants for life  
with several inheritances. Co. Litt 184 a 2 Words 126.  
Litt 5283. The issue then of each will have a  
moiety of the estate after the death of both  
but the heirs of neither can take until after  
the death of both for the survivor will hold  
the whole estate until his death & after  
his death the heirs will hold as tenants in  
common Litt 5283.

And if either of the donees die with  
issue on the death of the survivor his moiety  
reverts to the donee.



Joint  
Devancements

The rule is the same if an estate is given to one man & two women & the heirs of their bodies or to two men & one woman the rule is the same. the three take joint estates for their lives with several inheritances.  
Co. Litt 114

But if an estate is limited to a man & a woman who may lawfully intermarry & to their heirs of their bodies they two together take joint estate tail whether they actually intermarry or not & in this case if one die without hrs of his or her body & the other has living heirs the whole rest on the death of both will go to the issue

Co. Litt 182 a. Litt 5283.

### Unity of title

The estate must be created by one & the same act as by one & the same conveyance or by one & the same descender &c

Litt 5278

2 Woodes 128

Ld Ray 311

2 Bl 181

If an estate is limited to two persons by diff't conveyances they have not the same title. If a person makes one conveyance to A & another to B at the same time the fact that the conveyances were different is suff'to prevent their taking a joint estate.



Unity of time

Joint  
Tenancy

Their estate must commence at one & the same time. so if an estate is leased to A of an undivided half to commence to day & at the same time & in the same deed to B of the other undivided half for the same length of time to commence to morrow they hold as tenants in common, not as joint tenants C. Litt 188. 2 Bl 181

o If a remainder is limited to the heirs of A + B if A + B should die at diff<sup>t</sup> times the heirs of A + B will be tenants in common  
Litt 5283. 2 Bl 281. 181. 2 Woodes 129. 13 Co 55.

These distinctions are all professedly technical & arbitrary & "in vain should a man go about to inquire the principle of them."

o It seems that two persons may hold a <sup>joint</sup> use as jt tenants the commencing at diff<sup>t</sup> times. Hence a feoffment made to A to the use of himself & his future unborn son the <sup>cestui que</sup> use will be joint tenants of the use for by fiction the use commences at the time of the feoffment. "For all things executory relate to the first act & take effect thereby"

1 Co 101 13 Co 56. 2 Bl 181:2. D. 340

Joint  
Tenancy

Unity of possession

10 tenants are seized of an undivided half of the whole not of the whole of the half: that is they are seized "per my et per tout"  
2 Bl 152. 5 Co. 100. 2 Woodes 130. Litt 5285

The consequence is that one tenant cannot convey the other of any part for the other is already seized of the whole but one can release his right to the other & even a feoffment or a bargain &c will inure as a release Bro Bar 696. Park 5193. 197. 1 Vent 78. 3 Bac 206:7. Bro Jac 696.

If a fee simple is granted to husband & wife they are neither joint tenants or tenants in common on account of their legal union 2 Bl 152.

7 Co 140

Park 5225

2 Bl 152

Litt 5291

665.

Co Litt 157

327 b.

572 654

Shep 203

Hence the husband cannot dispose of any part of this estate as other joint tenants could nor can the wife laying her disability out of the question. In such case the whole of it must remain to the survivor & his or her heirs unless it is conveyed away in a fine or recovery in all both join for one cannot convey with conveying the whole & one cannot convey the whole with conveying the rights of the other.

In Bennett & Hackett

Sup: C. H. H. H.

C. Aug 7 1848

that this rule

prevail in Court

For he might

have done they

had the property

vested solely

in the wife.

This is an anomalous thing in the law but as each holds the whole neither can alone convey they appear to be something higher than joint tenants. This is a mathematical impossibility but a legal possibility.

This does not hold as to chattels. All are vested jointly in husband & wife for during coverture the Husband may dispose of the whole. 2 Woodes 128. Co Litt 351. Stra 516. 3 Wils 65 372 94.

If a married man is joint tenant with <sup>joint</sup> another person his wife on his death is not <sup>tenancy</sup> entitled to dower for the other joint tenant has a paramount right by survivorship. Litt 545  
Co Litt 30 a. 3 Bac 188.

In a parallel case The husband cannot be entitled to courtesy. 2 Woodes 128. in wh<sup>ch</sup> a Doubt is expressed but there is no reason to doubt

In this state however a married woman in such case is clearly entitled to dower for our <sup>cts</sup> always have held that there was no jus accrescendi of any description. & in q<sup>ue</sup>st in the U.S. there is no jus accrescendi

Upon the intimate union of interest & possession depend the principal incidents of joint tenancy one of wh<sup>ch</sup> is that acts done to or by one of the joint tenants with relation to the subject matter in joint tenancy is operative as <sup>to</sup> both. If therefore a verbal lease is made by <sup>both</sup> ~~one~~ reserving rent to one it shall inure to both - On <sup>as if by</sup> ~~and indicated~~ account of the privacy of this estate & for the same reason <sup>Co Litt 192</sup>  
If they join in making a lease & the lessee surrenders to one the surrender will inure to both  
2 Woodes 130. 2 Bl 182. Co Litt 214. 192

Hence livery of seizen made to one is operative as to both & as to the joint tenants

So the entry of one is effectual as to both & all. Hob 120. Co Litt 49. 319. 364. 2 Bl 182.



Joint  
Tenancy

On the same principle in all actions relating to the joint tenancy they must sue & be sued jointly thus both must sue in ejectment if they are disjoined &c. But there is one decision to the contrary in Eng. & one in the 2d of N York both of wh are late decisions. 6. Litt 150. 195. 2 Bl 182. Bath 328. 2 Benc 257. 6. (12 East 57. 61. 2 Kins 169 contra)

Comm R 384

What the rule will be hereafter is doubtful. In Comm the rule always was that joint tenants in com &c may either join in actions or sue separately. The reason assigned for these late decisions wh are contrary to former precedents is that it is more convenient to allow them to sue & be sued jointly or severally as the case may require -

Joint tenants cannot be sued by one another in trespass with relation to the joint estate - 2 Bl 183. 3 Leon 262. For each has a right to act upon every part. Nor at C - could one maintain waste agt the other say now by Stat. Notwithstanding the genl rule that the act of one is the act of both. One joint tenant cannot regularly do any act of his own wh will defeat the estate of the other. Hence one jt tenant cannot lease the whole of the estate witht consent of the other 1 Leon 234. 2 Bl 183. One jt tenant may however make the other bailiff of his moiety & in that case have an action of account agt him but unless the one has made the other bailiff at common law the one could not maintain an action of account agt the other & now by St 4 Ann one may always have an action of account agt the other, 6. Litt 200. 2 Wooddy 130. The practice however now is to apply to a C. of equity to compel an account (2 Bl 183 see note) -



Upon this intimate union of interest & <sup>jus</sup> possession depends also the grand incident of jt decescendi tenancy, which is the right of survivorship.

The survivorship is the right of the survivor to the whole interest upon the death of his companion.

2 Woodes 125. 2 Bl 183:4.

Therefore if 2 B & C are joint tenants on the death of A the whole int<sup>er</sup> vests in B & C & on B's death C takes the whole int<sup>er</sup> & holds the joint estate in severalty. for the death of one destroys the jointure as to him. This rule holds whether the estate is in fee for life for years &c -

2 Bl 183. Co Litts. 280:1

2 Woodes 125.

The reasoning upon which survivorship depends is this. The original interest of each jt tenant 2 Bl 184 is the same & as the survivor cannot be divested by the death of his companion & no person can now have a joint estate with him & if any one claimed a separate interest that would be to deprive the survivor of the right which he has in all & in every part. Now as the survivor's original interest remains & as no one can now be admitted either jointly or severally his interest must be entire & several

This right of survivorship is paramount to the claims of creditors & even of judgment creditors except where execution was prayed out against the joint tenant before his death. for in this case there is a specific lien which cannot be defeated with the death of the debtor.)  
Litt 528. Co Litt 184 c. 3 Litt 209:10.

Joint  
Tenancy

The same rule holds in general as to chattels personal & real held in joint tenancy but not universally it does not hold as to persons in joint trade for here the law merchant governs. Co. Litt 182 2 Woodes 125 Litt 5281. 11 Co. 31 Watson 49 140. 146. 294. 299. 302. 3.

Partners in trade are not therefore joint tenants to all purposes & the same remark applies to what are called joint tenants in Conn Watson 17. 116. 132. 1 Ves 242 252. Corp 449 814. 2 Woodes 185.

Non 27. So as to stock on a farm occupied jointly for the encouragement of husbandry. 2 Bl 599. Co. Litt 182

Neither the King or any other corporation can be joint tenant with another person. Bl says because the right of survivorship is not mutual & equal 2 Bl 184. Co. Litt 190 2 Lev 12. This reason of Bl does not appear to be the true reason for corporations may not be joint tenants with one another Litt 5296. 2 Woodes 126. But the reason of Bl is unsound in principle for it is not necessary to the existence of joint tenancy that the right of survivorship should be mutual for A & B may be joint tenants for the life of A & yet B here has no chance of survivorship if

2 Woodes 126. Co. Litt 184 186  
The true reason is this that a right to hold property jointly is not within the purpose for which corporations are created for it is general rule that a corporation is entitled to no rights but such as are necessary to its existence & to the exercise of that business for which it was created - 3 Colod 13. 35 Bl 594 47 R 810. 822. 4 Bac 642 in "Statutes" Div construction.

The right of survivorship does not however as has been 1 Blt 48  
heretofore incidentally remarked exist in Conn —

Yet it may be destroyed 1<sup>st</sup> by the  
destruction of any of its unities. unity of time  
cannot in the nature of things be destroyed —

But any of the other unities may be destroyed  
as by destroying the unity of possession as if  
a severance is made they become tenant in  
severalty 6. Litt 188. 193. 2 Bl 185.

But by the com law one joint tenant  
cannot compel the other to make partition  
tho they might by agreement make a partition  
Litt 529. 2. 2 Bl 185.

But by st 31 + 2 Henry 8 any joint tenant  
may compel a division by writ of partition  
(Lb). We have a st. to the same effect in this  
state. Our st however expressly excepts  
sequestered lands i.e. lands appropriated to  
the support of ministers + schools + ecclesiastical  
lands also wh are sequestered as town commons.  
St Com. tit 56. 52. + tit 54. 53.

Our st also enables guardians &c of  
infants to make partitions for their wards  
but there was no need of this statute for  
at common law infants were capable of  
making a partition  
(3 J R. 1805)



A joint tenancy may be destroyed by the destruction of unity of title, thus if one joint tenant conveys away his interest the purchaser & the other joint tenant hold as tenants in common.

Litt 5 292 2 Wodles 130. 2 BL 185 Salk 286  
6 mod 244 6o Litt 180a

But a devise by one joint tenant does not destroy the joint tenancy for it cannot take effect for the other joint tenant has a paramount right to the estate Litt 5 257. 6o Litt 185 b. 2 BL 186.

The tenancy may be destroyed by the destruction of its unity of int. thus if two are joint tenants for life & one of them purchases or acquires by descent the inheritance the joint tenancy is destroyed for the life estate of him who has the inheritance is merged in the inheritance. Bro 5470. 2 BL 186.

And yet if an estate is originally granted to two persons for life & to the heirs of one of them they are joint tenants for life for these by being created by one conveyance are not separate estates but branches of one & the same estate & therefore no merger. 2 Co 60 6o Litt 182 2 BL 186



If one joint tenant in fee makes a lease for life of his share it destroys the joint tenancy for it is a severance of the freehold

Litt 5303.302

Co Litt 191b

2 Bl 186.

If one of three joint tenants alienates his share the joint tenancy is destroyed only in part. A B & C are joint tenants & A alienates his share. B & C retain two thirds in ft tenancy the purchaser therefore holds the whole of one undivided third in common with B & C

If one of three releases his part to one of the other two here the releasor holds the whole of one undivided third in common with himself & the other & as to the remaining two thirds is held in joint tenancy between B & C. —

Litt 5294.304

2 Bl 186.

Whenever the jointure ceases the jointure cessandi of course ceases with it —

Co Litt 188. 2 Bl 186

It is in genl advantageous to destroy the jointure. But where there are joint tenants for life it is plainly advantageous to continue it. for if A & B are joint tenants for life if B dies first A has the whole estate until his own death but if he had severed he would only have enjoyed half after the death of B. but if he dies first he enjoys as much in one case as in the other & the same is true of B if A dies first. —

2 Bl 187

✓ If two are joint tenants for life & one alienes for any other life than his own he ipso facto forfeits the whole of his interest. for such a conveyance has in the first place an effect of severing & his grant of it is a forfeiture. the grant is void & the whole estate inures to the other  
6. Litt 252. 4 Leon 2237 2 Bl 117.

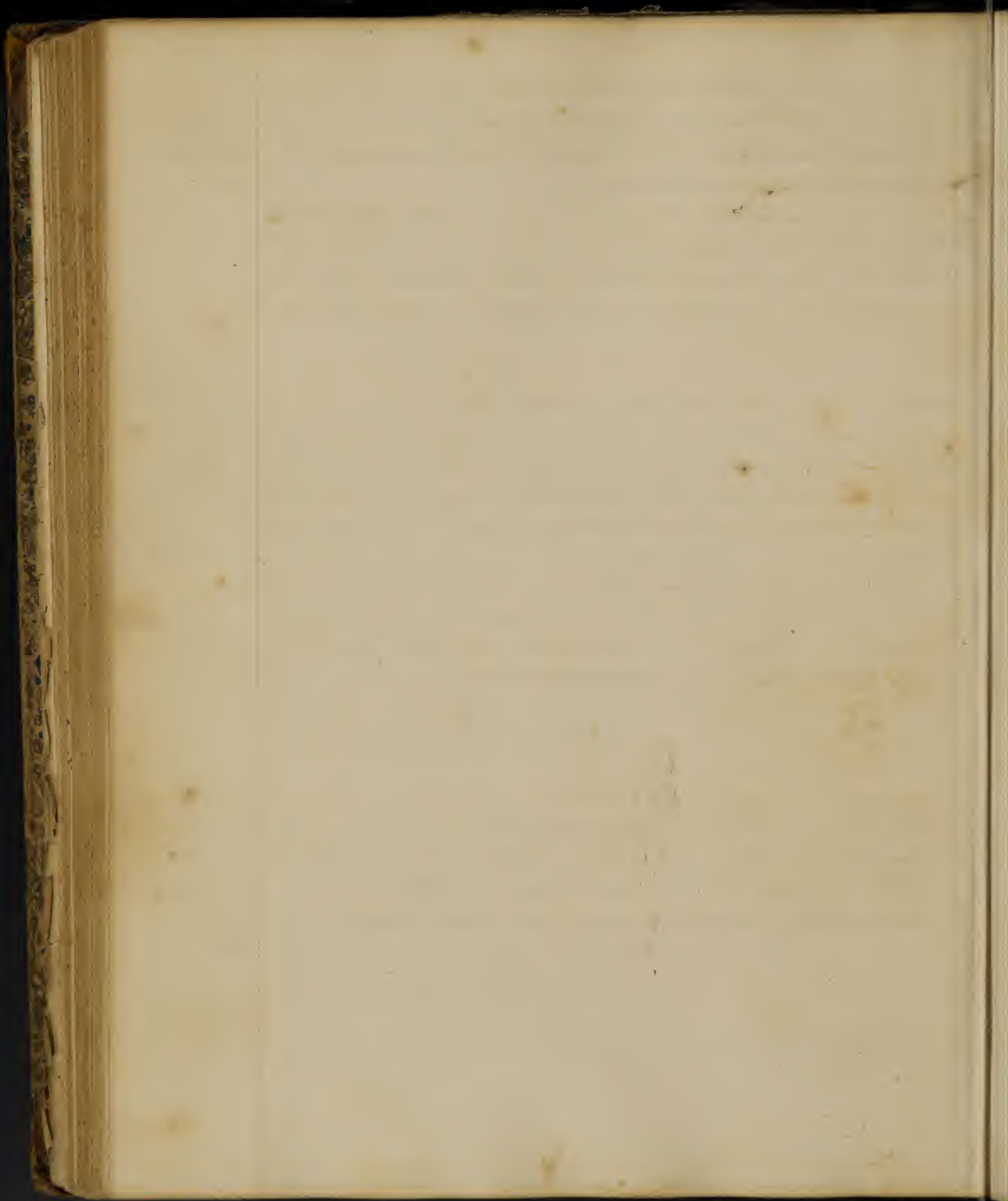
Co. Litt 199.  
200.  
Corp 217

✓ If one joint tenant evicts his companion the tenant evicted may have ejectment ag<sup>t</sup> the other not to put the other out, but to restore himself to the joint possession - but to entitle one to this action there must be actually an ouster sole possession by one & the reception of all the profits will not entitle the other to this action for when there is no ouster the possession of one is regarded in law the possession of both & the reception of the profits by one is the reception of the profits by the other. - by both.

✓ The sole possession of one however denying the title of the other & refusing to permit the other to enter is sufficient evidence of an ouster. It is not necessary to make an ouster that one as Ald. Mansfield says should take the other by the shoulders & force him out. -

Adverse poss<sup>n</sup> is deemed to be an ouster.

✓ One of them may also maintain an action  
of waste ag<sup>t</sup> the other by the construction of the 2 Bl 158  
St Westminster<sup>2</sup> but by the common law no such 2 Inst 403  
action could be maintained.





## Real Property (1019)

### Estate in coparcenary.

are such as have descended to two or more persons 2 Woodes 113  
from their ancestor. or heirs - 2 Bl 187

This estate at common law exists only between females. & their representatives. for at common law the oldest son takes the whole but primogeniture does not exist between females - 73, the custom of gavelkind all the sons are coparceners (Ib)

In Bonn: all the children of a deceased ancestor are coparceners & that is the law of every state in the union - his and his wife are coparceners but not in the same way

But all the parceners however numerous Co Litt 163  
are considered in law as constituting but one heir 2 Bl 187  
& have but one estate among them. 2 Woodes 113:7:8.

The properties of this estate when created 2 Bl 188  
are in most respects like those of jt tenancy  
there are however only three essential unities  
for unity of time is not required

Like joint tenants they may sue & be sued Co Litt 164  
jointly. The entry of one is the entry of all 183. 234. 243-6  
The seizure of one is the seizure of all and 2 Woodes 117:8  
an Entry by the guardian of a parcener is 7 Bl 986.  
the entry of all the coparceners. (Ib) 2 Bl 209:28  
188

One parcener can not have trespass ag<sup>t</sup>  
Co. Litt. 174 the other nor can one have waste ag<sup>t</sup>  
2 Bl. 1358 another for one parcener could always  
2 Wode. 119:20 protect herself from waste by writ of partition  
wh<sup>ch</sup> it tenants could not do until the Statute  
32 Hen. 8. or  
17 Ed. 2 The reason why parceners even at common law  
could have a writ of partition is, that as  
they became parceners with mutual consent  
& therefore the coparcenary can be dissolved with mutual  
consent.

Differences betw<sup>n</sup> coparcenary & joint tenancy -  
Litt. 254 An estate in coparcenary is always created  
2 Bl. 158 by descent & joint tenancy always by purchase  
2 Wode. 114:6 No other than estate of inheritance can be held  
in coparcenary. any estate can be held in  
joint tenancy.

2 Wode. 116 Every thing wh<sup>ch</sup> can be inherited may be held  
Co. Litt. 164:5 in coparcenary lands tenements & hereditaments.

So, an estate in coparcenary, no unity of  
time <sup>if</sup> necessary, if therefore, one parcener  
dies the survivor & the heir or heirs of the  
deceased parcener are coparceners.

The interest of coparceners must be the same (see Litt 164. 174. 2 Woodes 114. 5. 2 (BL 188)) For they inherit one & the same estate together.

This estate differs from joint tenancy in that parceners tho' they have unity of interest yet they have no intirety of interest each is seized of the whole of an undivided half

Hence there is no survivorship (16)

If those who claim in coparcenary are related in equal degree to the common ancestor & each claim immediately of their own Co. Litt 164 2 Woodes 115 right they take per capita that is each has an equal share.

If an ancestor dies leaving two daughters two nieces &c each takes per capita that is each has an equal share

But if the parceners are not related in equal degree or if they are entitled only in right of an intermediate ancestor the shares are unequal. Thus an ancestor has two daughters one dies in the life time of the ancestor leaving two children. The daughter of the ancestor claims in her own right but the grandchildren take in the right of the mother & take what she would have taken had she lived that is the two grandchildren take one half & the daughter the other half -



But if the parceners are all in equal degree but are not entitled in their own rights but by right of representation they take by stirpes thus the ancestor has two daughters both of whom die before the ancestor one leaving one daughter & the other five. the five on the death of the ancestor take one half & the one the other half of the estate

2 Woodes 114. Co. Litt 114.5.

This same doctrine prevails under the statute of distribution in the case of personal property. (vide Stat<sup>us</sup> "Executors")

2 Woodes 115.

In descent from coparceners males are preferred to females as in other cases of descent at common law.

Descent in coparcenary at common law obtains only where there are no other children except females.

As long as land continues in a course of descent if no partition is made it continues to be held in coparcenary

But as soon as a partition is made or as soon as one alienes her share if no partition is made still the purchaser does not claim by descent & the coparcenary is destroyed & the purchaser & the parceners hold as tenants in common.



But if one of the parsones dies  
the heir of this parson & the other parson  
hold as coparceners. for the estate continues  
in a course of descent.

o Mr. Woodeson says if one coparcener  
dies the other the coparcenary is at  
an end. but he has neither authority a principle  
for this rule. *2 Works, 118. 19*

o If two parsones marry & die & leave  
husbands entitiled to courtesy the husbands  
hold as tenants in common for they do not  
claim by descent but the heir of the two  
parsones after the death of the husbands  
hold in coparcenary. for they claim by descent  
& the inheritance is not broken by the intervention of  
the life estates. *Co Litt 167. 6*  
*2 Woods 119*

Coparcen-  
ary.

It seems to be settled that a husband is entitled to courtesy in the lands held by the wife in coparcenary. And in a parallel case I have no doubt that the wife is entitled to dower. Litt 5264. 2 Woodes 119.

2 Bl 159 Voluntary partition may be made in  
2 Woodes 120 four ways. by coparceners.  
3 G. 20.  
Litt 5243  
264.

Litt 5241 Compulsory partition may at common law be  
2 Bl 159 made between coparceners because since the  
2 Woodes 120 estate is created with mutual consent it  
1706 65-19 may be destroyed with mutual consent.  
Fitz 62 a writ of partition therefore will lie at  
60 Litt 1696 common law or the partition may be effected  
16 Aiter 171 by this writ or by a bill in equity this  
last is now the practice where the estate is  
is complicated as where there are incumbrances &c

On a writ of partition two judgments are always necessary. the first that a partition should be made on the judgment a writ issues to the sheriff commanding him to cause partition to be made by the jury. on the return of the jury's inquisition the second judgment is made viz that the partition be ratified & this second judgment is of course given unless the inquisition of the jury can be impeached for fraud or misdirection.

And this partition binds as well infants as adults. Hence infants may make a voluntary partition all will be binding. 3 D. 1803-5 1 For 616 Co Litt 169b

When the thing held in coparcenary is indivisible with destruction of it compulsory partition is never made in this case the practice is for the eldest sister to enjoy the thing & make the other sisters compensation. or for the several sisters to enjoy it alternately. 2 Bl 190 Co Litt 164:5

Tenancy in common

2 Bl 191

Tenants in common are those who hold by several & distinct titles but by unity of possession

But by this is to be understood that no other unity than that of possession is absolutely necessary to a tenancy in common. but their titles may be either distinct & several or the same. —

3 Bac 188.

194.

Lord Coke's definition is "those who hold lands by one title or by several titles & by distinct rights, not by joint rights" this is far as it goes is correct.

Where the interest & title are the same & where they commence at the same time & where there is unity of possession the estate is prima facie a joint tenancy & will be a joint tenancy unless apt words are used to create an estate in common if these words are used the estate is an estate in common 2 Wodes 134. Ex gra An estate is granted to A+B for life by the same conveyance this is prima facie a joint tenancy but if it is said to hold as "tenants in common" this is a tenancy in com. — If there is no other unity than that of possession the tenants are of course tenants in common (2 Bl 191). Thus suppose A seized in fee conveys one moiety of his estate to B for life here there is no other unity in the estate than unity of possession & A & B are tenants in common for B's life unless the possession is divided.



One tenant in common may hold in Tenancy  
for & another in tail for life for years &c. in  
Common  
One may hold by purchase from a one  
from purchase by 3d.

The estate of one may commence at  
one time & that of the other at another for  
(2 Bl 192) unity of time is not necessary to a  
tenancy in common.

A tenancy in common may be created  
either by such a destruction of an estate in joint  
tenancy or coparcenary as does not destroy 2 Bl 192  
the unity of possession or by special limitation 2 Wils 134  
in a common assurance. See on this Co Litt 189. 191

Thus if one of two joint tenants  
alien to A A & the other joint tenant are  
tenants in common or if two joint tenants alien to  
diff persons the alienees are tenants in common. 3 Bac 194.

If one of two parceners alien her share the other  
alien & the other parcener are tenants in common 2 Bl 192. Litt 5309

If an estate is granted to two men or  
two women ~~the heirs of their bodies~~ these two men or women are tenants Litt 5283  
in joint tenancy for life & on the dropping 2 Bl 192  
of the life estate the issue are tenants in  
common

## Tenancy in common.

And whenever a joint tenancy or  
3 Bac 194 coparcenary is destroyed without a divorce or  
2 Bl 193 partition an estate in common is of course  
created.

2 Bl 193

A tenancy in common may be created  
2 Words, 134 by special limitation in a common assurance  
3 Bac 194. but where it is intended to create an estate in  
common care must be taken not to use words  
creating a joint tenancy.

2 Bl 193

If by deed or devise there is granted or  
devised to two or more persons an estate which  
is not an estate in joint tenancy, it must be  
a tenancy in common (provided of course the  
possession is not divided)

2 Bl 193

3 Bac 195.

The rules of construction however by  
the common law favor joint tenancy more  
than tenancy in common if therefore an estate  
by one & the same conveyance is limited to  
two or more persons & it is doubtful whether  
a joint tenancy or a tenancy in common is  
intended. It will construe an estate into  
a joint tenancy. but as the reason for this rule  
is feudal it is doubtful whether it will now obtain.

The safest way of limiting an estate  
where a tenancy in common is intended is  
to convey to the grantees expressly to hold  
"in tenancy in common & not as joint tenants".  
for this excludes all doubt.

But other words will answer if a grant is made to A & B to be held the one half Tenancy by one & the other half by the other A & B in common are tenants in common. (Co Litt 190. 2 Bl 193.) For he by the very words they take distinct moieties, Litt 529. 3 Bac 194.

If one grants an undivided half of an estate to D & S he & S are tenants in common Litt 529. 2 Bl 193. They here have diff. lites commencing at diff. times. Co Litt 190. 3 Bac 194.

A deed or devise of land to two persons to hold jointly & severally will create 2 Bl 193 a joint tenancy. for joint tenancies are favoured Poph 152 The reason given by Blackstone however is that the word "severally" merely denotes that the estate may be divided. but this reason is <sup>not</sup> satisfactory. The truth is the two words are inconsistent & the word jointly governs.

An estate devised to two or more to 36. 39 be equally divided between them is an estate <sup>in common</sup> 1 Ven 32  
in common — 2 do 323. 365. 6  
2 Bl 193

So also a devise to "A & B equally" or 2 Roll 90. "to hold equally" creates a tenancy in common bow 657 for "equally" means "severally". 2 Ves 252. 1 Eq. ca 290, Brocks 695

But it has been held that either of the 2 Bl 193 expressions, in the two foregoing examples in a 1 PM 17 deed will create a joint tenancy. 1 Eq. ca 291

There is however a modern case Salk 391 agt this last rule 2 Moores 135. 1 Mil 341. Comp 660 Bonyon R 88 & in which such expressions in a deed create 2d Rayn 622 a tenancy in common & this modern 3 Bac 195. rule Judge Gould thinks is the true one,



Tenancy  
in  
Common

A tenancy in common may exist in any sort of property (2 Woodes 135 lide 5320.) and in any estates

Slide 544.5

2 Woodes 135

The wife of a tenant in common of any inheritance is entitled to dower. & it seems that in a parallel case the husband is entitled to courtesy. at any rate there is no reason why he should not be. There is nothing in a tenancy in common to exclude down a courtesy - no jus accrescendi.

As tenants in common have distinct interests that is distinct rights one may directly convey his estate to another tenant in common a ft tenant cannot do this for each ft tenant is already seized of the whole.

✓ Tenants in common are not at common law compellable to make partition for the same reason that ft tenants are not

2 Woodes 136

But by St 31 & 2 Henry 8. tenants in common as well as ft tenants may have a writ of partition.

✓ Between tenants in common there is no jus accrescendi. The reason is that they take by distinct moieties. 2 Bl 194.



Tenants in common could not formerly <sup>Tenancy</sup> ~~in~~ Common join in an action relating to the reality because Common their interest is several. But there is a late decision in N.Y. & one in Engl? in wh<sup>ch</sup> it is held that tenants in common, & tenants & coparceners may sue either jointly or severally. Litt 5311. 2 Wodes 135. Co. Litt 197. Salk 390. Bath 340. 2.4 B.R. 387. Stra 520. Id Rayn 312. 341. (1 Court R 354).

12 East 61. & 3 Gains 169. See 2u Do these cases go any further than to say that ten<sup>ts</sup> in comm<sup>on</sup> may make a joint demise & thus virtually join as k<sup>ts</sup> in equity.

But where an indivisible ~~thing~~ <sup>chattel</sup> ~~is~~ <sup>is</sup> held in common they must always have joined. Co. Litt 197 b. 2 Bl 194. In relation to personal actions founded on their interest in common I trust that the old rule stands viz that all the joint tenants or tenants in common must join as in an action of trespass quasi clausum pro fit.

Personal actions in all cases survive to the survivor even among tenants in common. & for this reason they must always join in personal actions, & besides for one wrong it is ag<sup>t</sup> policy to allow several actions -

At common law one tenant in common could not maintain an action of account ag<sup>t</sup> the other for receiving more than his share of the profits unless he had made the other bailiff. But by st 4 Ann tenants in common may in all cases maintain actions on account ag<sup>t</sup> one another when one receives more than his share of the rents & profits.

Litt 5315

Co Litt 105

2.4 Bl 317.5

Ex p<sup>ar</sup> 408

2 East 154

3 Benc 116.

Co Litt 199. 200

2 Bl 194

Tenancy  
in  
Common

By stat 112 One tenant in common may maintain waste ag<sup>t</sup> the other 2 Bl 153. 194. He cannot have this at C L.

3 Wils 118

1 East 568 If one tenant in common ejects the other the latter may have an action of ejectment, not however to turn the other out but to restore himself to possession

200. 406 120

But in this case there must be an actual ouster as in jt tenancy. see "jt tenancy" § mod 109. There must be a forcible ouster or what the law deems equivalent, as sole possession claiming title to the whole &c.

1 East 568

Str 531.

460. 115

Cow 217.

Great length of time of such sole possession acquired in by the other, by one <sup>adversely</sup> holding will then has been no accounting for the profits will be suff<sup>t</sup> evidence of an ouster for the jury to let in the statute of limitations in order to bar the ousted tenant. Tho between tenants in common as such the Stat of lim<sup>s</sup> does not run for the prop<sup>y</sup> of one is prima facie the prop<sup>y</sup> of both. But we are told in the books that the 3 Bl app<sup>t</sup> confession by the def<sup>t</sup> in ejectment of lease entry Bull<sup>t</sup> 1109 & ouster under the common rule is suff<sup>t</sup> evidence of ouster. But this means no more than this that 3 Bun 1195 this is suff<sup>t</sup> to prevent a nonsuit so that the case may go to the jury. the actual ouster may be contested on the trial notwithstanding the confession. - ed 2a If ten<sup>t</sup> in comm sh<sup>d</sup> confess lease ouster &c guilty could he show that there was no actual ouster? Must he not confess the ouster specifically? 4 John R 311. 2 Idw 538 (u. b.).

And after recovery in ejectment by the  
tenant ousted he may of course have trespass 3 M & 118  
for the mesne profits during the dispossess but  
this trespass is merely an action of account  
tho' in form trespass & besides the record in eject  
prevents the deft. from taking advantage of the tenancy.

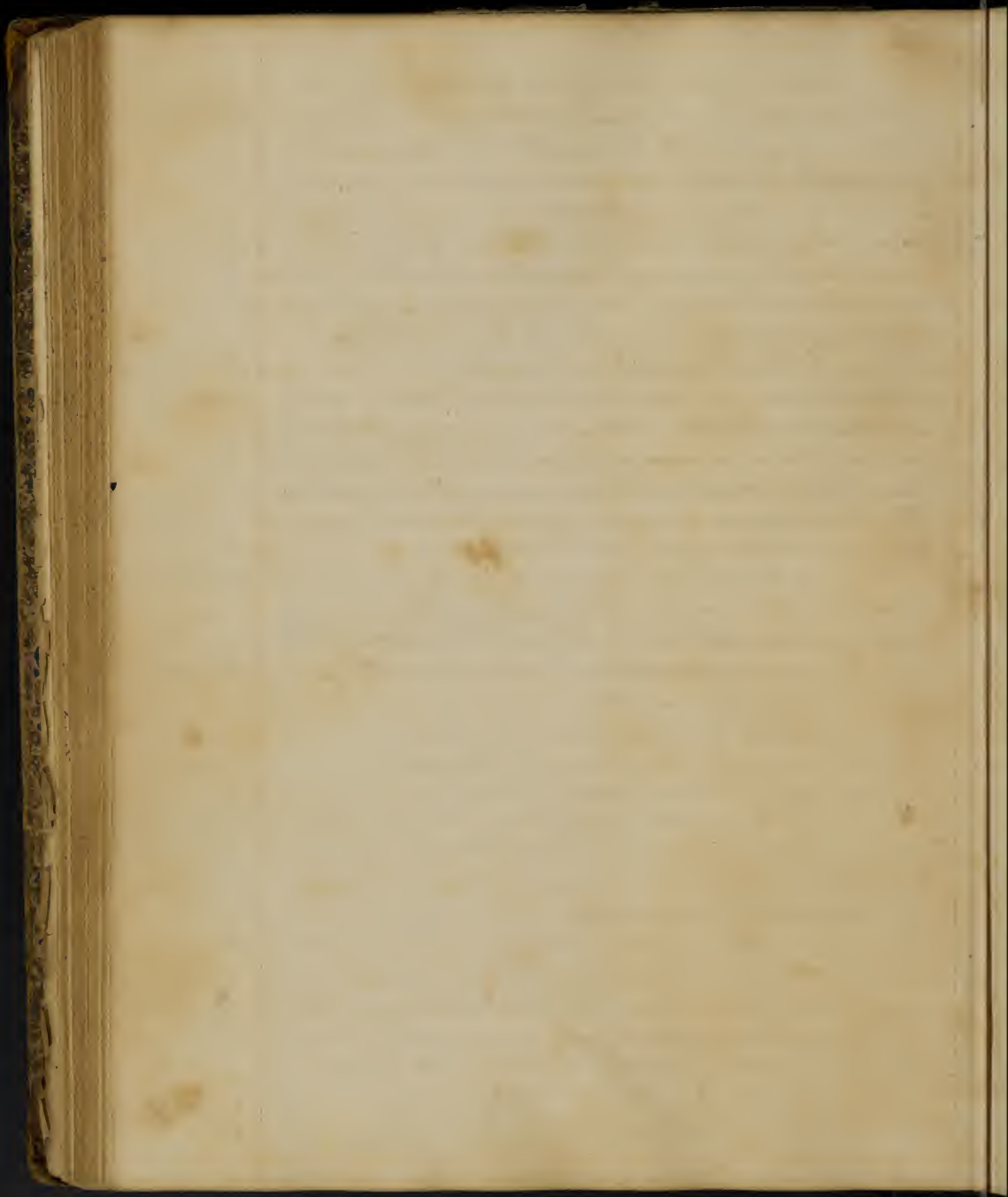
These judicial remedies in the action  
of ejectment & trespass as above extend only to tenants in common of things real or things Litt 532:3  
surrounding of the realty. but if two or more persons are joint tenants or tenants in common of Co Litt 200:2  
a personal chattel there is no judicial remedy 3 Bac 219  
tho' one tenant may solely use the property the  
other has no remedy but by 'seizing his time' as Lord  
Coke says. that is but by seizing the property when  
he can get a good opportunity.

4<sup>th</sup> tenancy in common may be destroyed 2 BL 104  
by voluntary or compulsory partition or by  
uniting the interest & possession in one & the  
same person by purchase or by descent

See 3 Bl 571:1 & 571:2  
2004:2 2004:3 4 1000 200  
425:310

Letting to hold for a term of years or for a  
contingent period of years 2004:3 2004:4







Real Property 1:14)

Modes of acquiring real property

1<sup>st</sup> Purchase which includes every mode of acquiring an estate except by descent. tho' it is sometimes 2 BL 241:4 used in a more limited sense. — Thus an estate acquired by forfeiture, by escheat, by occupancy 2 BL 241:67 of prescription & by alienations, is said to be acquired by purchase. I shall not treat of any of these modes except of that by alienation, for the others see Blackstone

The most usual mode of acquiring title to real estate by purchase is by alienation — 2 BL 257 ation by which is comprehended what is usually denoted by purchase in its limited sense. that is it comprehends every mode of transmitting property by mutual agreement from one to another.

During the early periods of the feudal government the tenant could not alienate 6. Litt 94 or incumber his estate without the consent of 2 BL 57:257:8 the lord & of the heir apparent. H. Brinn 5:4.

Nor on the other hand could the lord 2 BL 288. alienate his seignory without the consent of the tenant which consent was called attornment to the alienation of the lord.

This restraint of alienation was 4. Brinn 3:4 then mutual. indeed during the reign of of Wm the conqueror & his sons lands were absolutely unalienable.

And even some time after the right  
2 Bl 55.120 of alienation was introduced the highest  
estate that could be granted was an estate  
during the life of the grantee.

These restrictions have however been  
gradually abolished. The first statute  
which made the greatest inroads on the  
restriction of alienation was that of  
Quia emptores 18 Edward 1<sup>st</sup> & the 1<sup>st</sup>  
1<sup>st</sup> of Edward 3<sup>rd</sup>. Still the right of alien-  
ation was trammelled by fines until  
the 12 bar 2<sup>d</sup> which abolished fines  
for alienations for freehold estates &  
which abolished the military tenures  
and converted them into socage. alienable at pleasure

This last statute removed all the  
restraints on alienation except that  
arising from attornment. 4 bar 9. 47  
2 Bl 77:9. 299.

And at length the necessity of  
attornment was removed by 14 & 15 Ann  
2 Bl 290. This is a very genl account  
of the progress of the right of alienation

Acquisition of title by deed

The legal evidences of the alienation of real 2 Bl 344  
property are called, in law, common assurances & 6 Briss 4  
because it is by these that every man's estate is  
assured to him.

These assurances are of 4 kinds (2 Bl)

- 1<sup>st</sup> Seeds or as they are called, matters in  
paris as distinguished from matters of  
record.
- 2<sup>d</sup> matters of record, or judicial assurances  
transacted only, in the King's court of record.
- 3<sup>d</sup> assurances founded on special custom  
of w<sup>ch</sup> our law has nothing to do  
for we have no local customs.
- 4<sup>th</sup> Devises. which are not common law  
assurances but were introduced by stat.

Of the 2<sup>d</sup> & 3<sup>d</sup> I say nothing for these  
modes are extremely rare both here & in  
England. But see 2 Bl 344. 365.

Alienation by deed.

A deed is a writing sealed & delivered. Co Litt 171  
writing & sealing constitute the <sup>instrument</sup> ~~deed~~ but 2 Bl 295  
with<sup>delivery</sup> delivery, it cannot take effect & Co Litt 35b  
therefore, is of the essence of a deed. 4 Briss 10

It seems doubtful whether in the law  
of Conn sealing is necessary to a deed. for  
our statute prescribes writing, signing, delivery  
& acknowledgment & recording as requisites  
for a deed & devise & says nothing about sealing



Cotoppel,-

2 Bl 295 The making of a deed is the most solemn disposition whh a man can  
Bac Abr make of his property hence it is said  
dash. o. that a man shall be estopped by his own deed.  
Co Litt 47 a 227 a.

the meaning of this maxim is that  
2 Bl 295 no one shall be admitted to pro or prove  
3 Bl 305 any thing in contradiction to his deed  
Bac Abr by this is not meant that he cannot deny  
cases o the making of the deed. but if he acknowledges  
that the deed is his he may not aver or prove  
any thing in contradiction to it in contra<sup>n</sup> of the  
terms or legal operat<sup>n</sup>. and therefore if A makes a lease  
Salk 296 to B of land to which at the time A  
37 L 438 has no interest whatever but A after  
441. 371 wards purchases the land this purchase  
Porton 60 will inure to B for A is not permitted  
160. to deny the covenants in the deed by whh  
2 JR 171 he has allowed that he owned the  
Lowp 579 land. the fact then that A had no  
Pow m/mnt trust in the land at the time cannot  
495. 6. therefore be proved & therefore the land will  
Ed Ray 729 go to B for tho' it is a maxim that a man can  
1648. 1552 convey nothing in whh he has no interest at the  
Co Litt 47 a 6) time of making the conveyance yet as A is estopped  
by his deed, it in this way, amts to the same thing as if he could.

In this state however it has been decided  
5 Day 299 that a total fraud in the consideration  
of a deed might be alledged to defeat it  
but this professedly is a departure from the  
principles of the common law. but the  
common law remedy would be an action  
on the covenants in the deed.



But tho' at common law a person might not disavow a fraud in the consideration. being estopped Estoppel

Yet A man might at common law indeed aver a fraud in the execution but not a fraud in the consideration. for an averment of fraud in the execution amounts to a plea or averment of non est factum.

In a deed of conveyance or a lease the estoppel is created by the covenants express or implied. & with such covenants there is no estoppel, words of this kind Rede & concessi imply a covenant that the grantor has a right to convey. <sup>imply such</sup> ~~imply~~ such <sup>is implied</sup> ~~is implied~~ a deed of quit claim is no estoppel that is it does not estop the party making. <sup>Co Litt 265</sup> it from denying that he had any title <sup>Litt s 446.</sup> at the time of making. And he may <sup>37 C 370</sup> afterwards purchase the land & hold up the release in the quit claim deed, if he had no interest in the land at the time of making the deed. Because the quit claim deed contains neither expressly or impliedly any covenant that the releasor has any title to the land at the time of making the quit claim deed or release as it is called in Engl. -

Any bond or covenant is as much an estoppel as a deed of conveyance thus the obligor in a bond cannot deny that there was a consideration if he has acknowledged it in his bond. -

## Deeds

A deed executed by one of the contracting parties only is called a deed poll. or single deed.

2 Bl 295-6 If executed by all the parties to the contract the deed is called a deed indented. & in case of an indenture of lease the lessee is estopped to deny the title of the lessor, but this rule does not hold in case of a deed poll.

When each part of an indenture is executed by one of the parties only & delivered to the other the diff. parts are said to be interchangably executed & in this case the part executed by the grantor is called the original that by the grantee the counterpart. But where every part is executed by all the parties, the several parts are all called originals.

4 Br 12 This distinction has a material effect in the law of evidence for where the deed is interchangably executed that part which is called the original is the better evidence

And where lease by indenture is voided by judgment of law, upon sued <sup>for rent</sup>, he may deny the title of the lessor. 3 IR 441. 2

### Requisites of a deed

1<sup>st</sup> That there be parties able to contract 2 Bl 246  
for the purpose intended. & a subject matter Co Litt 35  
to be contracted about. In every grant 4 Br 30. 14  
therefore there must be grantor, grantee & thing  
granted.

If the whole interest in any subject 4 Br 13. 14  
is to be granted, all those who have any part both 76.  
in the interest should be parties to the deed  
otherwise only a part will be conveyed, for  
the interest of those who are not parties will  
not pass.

So those intending to take any  
immediate interest under a deed should be  
parties to it. i.e. all those intended to  
take any other interest than a remainder  
must be parties to it. if not those who are not  
parties take nothing. If then it is intended to make  
A & B tenants for life, they must be parties  
for at C's livery of seisin was necessary.

But one may take a remainder 4 Br 14  
by a deed to which he is no party, thus if 426.  
A is about to make a deed to A for H & B 313.  
life remainder to B. B need not be a Co Litt 231 a  
party, he need not receive it & yet he will  
take. he must however be named in the deed.

The reason is that the investiture of  
the particular tenant inures to the remainder  
man, as both interests are created by one  
& the same act.



## Deeds

### Who may convey by deed?

All persons under no legal disability may convey by deed 2 Bl 290. 4 Bru 14  
Co Litt 486. This disability contemplates only  
214. 390. the disability of persons but there may be  
3 Co 35 b. something like the disability of an estate  
Touch 89 to be conveyed. Thus a person desceiz'd  
Cro Eliz 447 tho' the rightful owner of the estate  
may not convey the estate while out of possession  
to any other person than him who is in possession  
for the same reason that choses in action may  
not to be conveyed viz that it encourages  
maintenance.

1 Root 100  
199. 402  
Hib 221  
"Land"

In this state we have a penal stat  
prohibiting a sale of land under these  
circumstances. it not only declares the  
conveyance void but subjects the party  
to whom the conveyance is <sup>the party making it</sup> made to a  
penalty amounting to the value of half the land  
But at common law the mere  
conveyance is innocent tho' void

But a conveyance by the desceiz'd  
owner of land to the desceizor is not within  
the common law or within our statute  
for this is not selling a law suit &  
does not encourage maintenance.

But the owner of land is not  
prevented from conveying his interest by  
the possession of another, unless the possession  
is adverse for such conveyance does  
not contribute to maintenance



And hence the owner of a remainder or Reversion may sell his interest tho' the particular tenant is in possession for the possession is not adverse. 2 Bl 290.

And whenever one is in possession of another's land claiming under the owner the owner may convey to a third person for the possession instead of being adverse is altogether recognizing the right of the owner.

The rule respecting the sale of lands Root 489 by a disceizer does not here extend to sales of land Root 221 by the state by its proper off<sup>r</sup> as Treasurer

Nor does it extend to sales made by executors & administrators under the order of a Ct of Probate Root 489 or other prerogative court. for this is substantially (Root 100) a judicial sale.

And further an agent of the law is not subject to this rule.

In the same way a sale by a guardian Root 491 of an infant's land by order of Ct or of the legislature is not within the rule.

Again a collector of taxes may sell Root 491. lands of wh<sup>ch</sup> the owner is disceized for the purpose of collecting the taxes from the owner. He again acts by order of law.

If a mortgagor in poss<sup>n</sup> going into possession under the mortgage afterwards holds 2 Root 499-500 adversely to the mortgagee the mortgagee may sell his equity of redemption. because the mortgage goes into possession tacitly admitting the right of the mortgagee. & besides if the rule were not so the mortgagee might always prevent the mortgagor from selling his equity of redemption for here the mortgagor cannot bring ejectment ag<sup>t</sup> the mortgagee as the disceizer in other cases can not the disceizer.

## Deeds

With regard to the incapacity of persons to convey by deed see "for infants Parent & Child". I only remark here that the conveyances of infants are only voidable & not absolutely void. This is the genl rule and it is the rule most advantageous to infants -

Ideots & lunaticks cannot make valid conveyance but their conveyances are only voidable may be set aside by their heirs see "Contracts" 60 Litt 41. 247. 1 Fonb 40 -

460 124 If an ideot or infant levies 12 do 1234 a fine or suffers a common recovery of Parks 524 their lands, they cannot void it neither 60 Litt 247 can their heirs avoid it for neither he nor they <sup>may</sup> contradict the record.

The genl rule of the common law 3 Bay 90 is that an ideot &c cannot avoid his own deed as the maxim is, no man may sheltify himself.

But this doctrine is exploded in Count. here the guardian of an ideot <sup>the deed of the ideot</sup> may impeach it.

If a person "non compos" purchases an estate on recovering his understanding 60 Litt 2 he may ratify or avoid it. If he 2 Bl 292 ratifies it his heir cannot avoid it but if he dies witht recovering his understanding or if having recovered he does not ratify it his heir may either avoid or confirm it - If there is no expess dissent the purchase is of course good.

460 10- For conveyances by a wife during 2 Bl 291:3 coverture see "Hus & wife"

If a deed is obtained from a person 5 Co 119  
under dureps on removal of the durep he 2 Bl 202  
may ratify or avoid it & the rule is the same if he purchases an estate while under  
dureps. In either case the durep makes the  
conveyance voidable not absolutely void, 292

If a deed is made by two persons Touch 81.2  
one of whom is capable of making the deed 4 Brn 429  
and the other not. the deed inures as the  
deed of the person capable of making of it & may be pleaded  
as his sole deed (rat) - If one person having an interest  
in land joins in making a conveyance of  
this land with B who has no interest in  
the land as to passing the interest this deed  
will inure as the sole deed of A. But as to the  
covenants I think that they are binding both  
upon A & B. for B is in the character of a surety

If only one of two grantees in a deed are legally capable of taking a  
deed the person capable of taking will  
be considered the sole grantee & he will  
take the whole estate. Perk 566.  
47 R 472  
14 B 614

If A who is a person legally Touch 182  
capable of making a deed joins with a  
feme covert in a conveyance the deed  
is the sole deed of A & may be pleaded  
as the sole deed of A. for the deed of  
a feme covert is in genl void. 4 Brn 29-







Those who are naturalized under the laws of the U.S. are not within the rules respecting aliens. From the moment of naturalization an alien becomes in this respect a citizen

In the St of Kentucky aliens may inherit real property & in Penn: aliens may take by devise or descent but in neither of these states can he take by deed unless he is domicilled &c. Eny. (Ed). Tit "alien"

By certain English statutes alien-  
ations in mortmain are forbidden or very  
much restrained. 1 Bl 479. 2 Bl 256. 4 Br 23  
By whh is meant an alienation to any corporation.

In this state we have no such St  
with us ecclesiastical & many other corporations  
may purchase lands unless prohibited by their  
charters.

But Banks & insurance companies  
~~to~~ are in genl forbidden in their charters  
to purchase more lands than is necessary for houses &c.

We have a St providing that all  
lands &c given to charitable uses. to the  
support of schools & of the gospel ministry  
shall forever remain to these uses according to  
the intention of donors. but this statute is  
frequently evaded by long leases. St Con Tit 54 53.  
These leases when made for a sum in gross have  
been sanctioned by our courts.

## 2 Requisites of a Deed

2 Bl 296

4 Br 24

a deed must be founded on legal + ~~real~~ consideration.

4 Br 22

Plow 308

It seems however not to have been necessary at common law that - any consideration should be expressed in a deed.

R. 6. 76. 55

2 Bl 136.

271. 2. 327.

330.

The necessity of expressing a consideration in a deed arose out of the doctrine of uses. in which as they were under the jurisdiction of Chancery & as in Chancery a deed expressing no consideration was deemed a resulting use (if no use was limited to a third person) it became necessary to express a consideration in a deed of conveyance.

2 Bl 296.

Park 553

4 Br 161

Since 27 Hen 8th uses are at an end for by this the legal estate is transferred to the cestui que use. & since that statute a deed expressing no consideration inures to the grantor for under the doctrine of uses the grantor in such cases was the cestui que use. & this is the case at law as it formerly was at equity.

Under the doctrine of uses if an estate was limited to a for the use of B. B had the beneficial interest & a thry legal estate but by the st of uses 27 Hen 8th in such case B had the legal as well as the beneficial interest. But the Ct have avoided these statutes by creating trusts which are precisely what uses formerly were.

But it has lately <sup>been</sup> doubted whether the rule that a deed not expressing a consideration inures to the benefit of the grantor extends 2 Bl 296. Co. to any other than deeds of bargain & sale Robertys 55.

I think, this don't a very reasonable Touch 221 one. — If a feoffment be made without consideration whitby 235-1 & the grantor expressly declares it to be to 1 Co 176 b & a the use of another there will be no resulting 4 Am 27. use. — 2 Bl 330.

In a deed of bargain & sale, a valuable 2 Bl 327. 338 consideration is absolutely necessary — Bro Loc 646. 4 Am 27.

And by the english law to this day Cowp 9. a deed without expressing a use inures to the grantor This rule I think is not the rule in Court nor in any of our states. We know nothing of the law of uses. A consideration is either good 2 Bl 330. 8 or valuable & either of these are suff<sup>t</sup> to 4 Am 24 support a deed of conveyance to uses.

It has been a moot question in this state whether the rule that a deed not expressing a consideration shall inure to the grantor. ~~with us~~ can prevail under our laws in this state for here the doctrine of uses never prevailed.

Now as to executory agreements, valuable consideration is necessary tho' as to deed of conveyance, a good consideration is suff<sup>t</sup>.



## Deeds

4 Br 25 or property. A good consideration is one  
2 Br 459 of relation or kindred. The only persons  
Robertson however who come within the description  
7 Br 129 of relatives so as to support a deed on  
2 Br 297 the ground of the consideration being  
444. for kindred are those of child, parent  
3 Br 39.83 brother, nephew, niece, sister & heir at law  
1 Don 361  
1 Don 337.

If a person is not as nearly related  
as nephew he does not come within the  
legal idea of near relative unless that  
person is heir at law.

A conveyance to the heir of my  
nephew in consideration of kindred unless  
that person is my heir at law is void.

4 Br 24 But marriage is always considered a  
2 Br 297 valuable consideration. This refers to future marriage

There is this material difference  
2 Br 297 between the effect of a good & valuable consid-  
4 East 59 eration. either a valuable or a good consid-  
eration will support a conveyance between the  
parties.

But a good consideration merely will  
not support a deed of conveyance as a  
creditor of the grantor or subsequent  
bona fide purchasers for value under the  
grantor.



Real Property No 15

Deeds. Consideration,

The consideration expressed to have been rec<sup>d</sup> in the deed cannot be denied by the grantor or his representatives for the purpose of defeating the title of the grantee & his heirs &c. for they are estopped by the acknowledgment. & even an averment of fraud in the consid<sup>n</sup> will not aid the party.

But the grantor may impeach the consideration for illegality. & this for the sake of the public. this is not denying the consideration. It is merely averring <sup>illegality</sup> fraud on the consideration. — If this could not be done the law declaring a contract founded on an illegal consid<sup>n</sup> void w<sup>d</sup> be a dead letter — And strangers as creditors & bona fide purchasers under the grantor may deny the existence of consideration, they are not party (except in "fraudulent conveyances") to the deed & therefore not estopped —

A deed expressed to be for 'divers good considerations' or for a suff<sup>t</sup> consideration is regarded as expressing no consideration for Bro E 394 the Ct cannot here judge what the consideration was and what a good & suff<sup>t</sup> consideration is a question of law & the parties are supposed not to know what a good consid<sup>n</sup> is that being matter of law.

But it has been held & properly so in New York that the expression "value rec<sup>d</sup>" or "a suff<sup>t</sup> consideration" for this is supposed to mean that money or property is rec<sup>d</sup> as consideration and as to the amt of consideration it is not material that it be expressed in a deed

## Deeds

But where the deed is expressed  
1 Co 176 to be "for divers good considerations" + "for  
2 Co 76:7 good + sufft consideration", the grantee  
7 Co 39a may aver + prove that money or kind  
40a red was the consideration. in the same  
- Co 26a & 6b manner a deed expressing no consideration  
4 Co 38 may be averred + proved to be for valuable  
or good consideration. This does not contradict  
7 Co 39b the deed. And if upon the face of the deed  
40b the relation of the parties appear to be  
Plon 804a within that of Nephew. the instrument  
1 Roll 68 imports a good consideration tho' none  
is expressed, + no averment is necessary.  
It is sufft that a consid: appears on the face  
of the deed tho' not expressed in terms to  
be the consid: -

The particular species of common  
assurances adapted to good consideration  
is "covenant to stand seized" + such convey  
ance on valuable consid: is void as a covenant to  
stand seized. And where the consideration was  
1 Co 176 70<sup>l</sup> expressed to be rec<sup>d</sup> from A. lands  
7 Co 39.40 were limited A for years with remainder  
2 Co 76 to B + C. it was held that averment  
was allowable that the deed was given  
as well in consideration of marriage  
between B + C. as of the consideration of  
the 70<sup>l</sup>. In this case it was ~~contended~~  
that the remainder was voluntary but  
the Ct held that it might be proved  
that the consideration was a marriage  
between B + C. for proving such consid  
ation was consistent with the deed +  
with respect to B & C the case was the same as where  
a deed expressed no consideration in all cases  
a consideration might be averred + proved

There are some cases in Johnson which at first sight appear to contradict this 7 John 342 last rule but they are consistent with it 3 Do 506 the rule in Johnson is that "when a precise consideration is expressed no other consideration can be proved" but this is confined to the parties <sup>to the consideration</sup> as in the last case A could not prove any other consideration than the 70 £. But B & C not being parties to this consideration of 70 £ may prove another consideration

Further where a specific consideration is expressed no other consideration can be implied from the face of a deed tho' if no consideration had been expressed a consideration might have been implied. 7 Co 394 43 Co 116 136 5 Co 97a 1 Pown 2368

If then A enters into a covenant with his son B to stand seized in consideration of 20 £. no consideration of kindred can be avowed or proved.

The reason is tho' it appears that the grantee was the son of the grantor yet as there is a valuable consideration expressed it appears that the relation was not the real consideration of the deed according to the maxim expressio unius est exclusio taciturn.

1 John 91. 4 Collaps 135 are in opposition to this rule but it appears to me that the English authorities are in principle correct. expressio unius est exclusio alterius



## Deeds

An acknowledgment in a deed of  
1 Root 479 the receiving of consideration by the grantor  
2 Do. 99 is not conclusive on the grantor in a  
3 John 492 collateral action. If therefore the grantor  
4 Brann 4 acknowledges the receipt of the consideration  
5 Catlin 100 & the grantee gives the grantor a note the  
grantor may recover on the note notwithstanding the acknowledgment. for the acknowledgment is inserted merely pro forma for the purpose of protecting the title of the grantee & nothing more

2 Bl 297 3<sup>d</sup> Requisite to a deed is that it be  
4 Br 25. written or printed on paper or parchment  
Cottrell 25-

But the deed may be in any language or in any characters. (16) If it can be interpreted & understood it is suff.

2 Bl 310.3 By the common law writing is not necessary for the conveyance of lands. But now by 29 Car 2. <sup>conveyance of</sup> no interest in land <sup>tenements &c</sup> for a longer time than 3 years without writing is valid.  
Coburn 76  
6 of frauds.  
240-7.  
1 Bar 72 And if a parcel lease for a longer term is made it will inure as a lease from year to year. & at all things incorporeal c<sup>d</sup> be conveyed.

2 Bl 297 only by deed. I presume that writing is required to the conveyance of land in every state. It is required in Conn by the 5<sup>th</sup> of frauds & perjuries dit 39 st. -

4 Br 26 And the deed must be written before it sealed & delivered, if one seals & delivers a blank paper & gives authority to another to fill it up. this can never be a deed.



In the case of bills of exchange & Deeds  
promissory notes the rule is diff't. for they  
is a simple contract & a formal delivery  
is not necessary. But a deed takes effect from  
delivery & if at the time of delivery they are blank  
pieces of paper they will always be so in law.

The next requisite is that the subject  
matter should be orderly set forth. But  
it is not necessary that the formal parts  
of a deed should be set forth in one  
precise order. But it is well to follow the  
customary forms. These formal parts are chiefly eight

1<sup>st</sup> Premises. contain the names of the parties 4 Brn 33; 30.  
and their additions. & the recitals if any 2 Bl 298  
the consideration. the description of the  
subject matter to be conveyed. the exceptions  
if any out of the subject matter described.  
The premises comprise all preceding the habendum.

The omission of the grantee's name in  
the premises does not vitiate the deed if  
he is named in the habendum.

And a wrong name in the premises 3 East 115  
may be corrected in the habendum & the corollary  
wrong name rejected as surplusage. The Tonch 75  
regular office of the habendum is to qualify &  
correct the <sup>premises</sup> and in one particular case where 4 Brn 419  
the name of the grantor was omitted in Salk 341  
the premises but the consideration was 10 mod 40  
expressed to be paid to him the deed was  
held to be good. as the deed of him to whom  
the consid<sup>n</sup> was paid. This was going very far,

Deeds...  
Premises

Any mistake in the name or description of the parties in a deed has the same effect as in a devise. therefore see devise.

Co Litt 3a  
4 Br 34a

If the deed gives the grantee a description which is applicable to one person only in the state. the description will point out the person. tho' the proper name is mistaken. But if the proper name is mistaken and a description inserted which applies to many persons there the deed is void for uncertainty.

If a grant is made to George earl of a. whereas the name of the earl of a is John. the deed will inure to John earl of a. for there is only one earl of a in the kingdom.

If a grant is made to Sarah wife of J. S. whereas the name of J. S.'s wife is Mary. Mary the wife of J. S. will take she takes by the description & the description

4 Br 35 is sufficient <sup>with any name</sup> But in ordinary cases a grant to one by his christen or sir name only the grant is void for uncertainty. There is a patent ambiguity which cannot be explained by parol. And a sir name acquired by reputation is as good as a sir name acquired by descent (26)

Co Litt 25a

And a party may be described with any name. as the wife of J. S. the oldest son of A. the issue of J. S. & a deed limited in this manner will be good -

4 NR 168

Clerical mistakes do not in general

vitiates a deed

Salk 341 10 Mod 40

The habendum & tenendum follow next. Deeds -  
the proper office of the habendum is to express 4 Br 467  
the quantity of interest to be conveyed tho' 2 Bl 295.  
it may be expressed in the premises.

The usual mode is to express it in the  
habendum -

But where the quantity of int<sup>ty</sup> is  
is expressed in the premises it may be restrained bro 7476  
enlarged or in any way qualified by the 2 Bl 295.  
habendum.

If therefore a conveyance is made  
to D<sup>r</sup> & the heirs of his body in the premises  
habendum to D<sup>r</sup> & his heirs. D<sup>r</sup> takes an estate  
tail with a fee simple expectant.

A conveyance to A & his heirs  
habendum to him & the heirs of his body 2 Bl 295  
according to most authorities A takes a bro Jac 476  
fee tail only as the estate is described 12 R 19. 23.  
in the habendum. for it is a gen<sup>l</sup> 16 S 1546  
rule that the expressions in the premises Co Litt 21 n2  
concerning the interest are to be 103. 294.  
restrained by the habendum & the Park 356 n 357 B.  
habendum is to be considered as an 4 Br 124  
explanation of the premises. Any or 154.  
generality Comp 9.  
in the premises may be explained by the habendum

If however the habendum is touch 53  
totally repugnant to the premises it Co Litt 297 a  
is void. for it is a gen<sup>l</sup> rule in 11 Hen 30  
deeds that if two clauses are 2 Co 23.  
utterly incomp<sup>at</sup>ible the first must govern. as also 5 Co 56  
the first deed governs in preferring to a 4 Br 433  
sub<sup>seq</sup> one. Ex: gratia - To A & his heirs habendum 2 Bl 295.  
to him for life or for year. the habendum is  
void. for tho' the habendum <sup>may</sup> explain the premises  
but it may not altogether contradict them -



## Deeds

The same rule of construction applies to the habendum with reference to the premises as applies to the construction of saving clauses in statutes —

2 Bl 299 The tenendum was formerly used  
4 Br 477 to show the tenure in which the lands granted were to be held. but as 12 Br 2<sup>d</sup> reduced all tenures to one the tenendum is of no use. but it is still used.

Indeed here there never was any diff: of tenure. & therefore there never was any use for the tenendum.

3 Co 71 The reddendum expresses the terms to  
2 Bl 299 be complied with by the grantee or lessee.  
Shoemaker 50 not rendering the usual rent &c.  
4 Br 475

2 Bl 299 The next orderly part is the conditions  
& this is the 5<sup>th</sup> orderly part.

2 Bl 300 Next comes the warranty by which the  
4 Br 477 grantor for himself & his heirs warrants the estate to the grantee & his heirs

Where there is a warranty if the grantee is evicted the grantor is obliged to convey to  
Cra 54 the grantee lands of equal value (2 Bl). according  
Litt 365 a to the ancient practice. 1 Br 10

4 Br 54

Bac abt

Cor. B. 4

2 Bl 304

4 John 11.

Co Litt 334 m

In modern practice warranties are out of use & covenants have taken their place  
This warranty may be express or implied & it was formerly implied where cov<sup>t</sup> of title is now implied



In the ancient deeds the covenants follow deeds  
the warranty, but now the covenants come Covenants  
in the place of warranties. We have indeed what  
is called a cov<sup>t</sup> of warranty but this is diff<sup>t</sup> from the  
warranty. The covenants in a deed of conveyance H. Br. 54  
are those parts in wh<sup>ch</sup> either party covenants 2 Bl. 304  
something for the benefit of the other. Plon 138

The usual covenants in all deeds of  
conveyance except quit claims releases are two.  
first that the grantor is well seized where it  
is a freehold & 'has good right to convey'  
or where the estate is not freehold that  
the lessor has good title. This is called in  
this country "covenant of seizin"

The second is what we call the Bac. abt.  
"covenant of warranty" which is that the cov. c. 3  
grantor shall warrant & defend the title Kib 1  
ag<sup>t</sup> all claims. or in case of leases the  
usual covenant is that the lessee shall quietly enjoy &c

And by this is meant that the  
grantor shall defend the title ag<sup>t</sup> all rightful titles  
but it does not extend to tortious claims.

The principal difference between a 2 Bl. 304.  
covenant & a warranty is that a <sup>warranty</sup> ~~covenant~~ H. Br. 49  
-ant binds the grantor & as the case 50. 66.  
may be his heirs to convey other lands 1 Ves. 111. 511  
of equal value in case of eviction under Bac. abt.  
a paramount title. It is a real contract cov. c.  
& binds the heirs when they have assets by descent. H. John 11.  
but never binds the co. or &c

## Deeds

A covenant only binds the grantor  
2 Bl 304 n - his personal representatives in an action  
60 Lile 378 n on covenant broken. but does not bind  
1 Ves 571 the heirs unless specially named and unless  
4 Br 506 b he has apert by descent from the cov-  
Bac abt grantor. These covenants are then strictly  
cov. c personal and the personal representatives whether named or not.

A variety of rules come under  
this head for which see "cov: broken"

1 Root 525

2 Do 252

2 Collep 381

If the land conveyed is described  
by abbuttals or by courses & distances &  
answers that description the grantor  
is not bound on his covenants tho  
the lands sh<sup>d</sup>. fall short by any distance  
of the quantity mentioned in the deed.

And one of these modes is the usual  
mode in this country.

The first mode is thus I grant  
lands &c. bounded north on &c. south on  
&c. abuttal north on the land of &c.

The other mode is thus I grant  
land &c. commencing at such a monument  
thence running south to such a monument  
& west & north & then east to the first mon-  
ument

2 Root 252

The rule is the same if the deed  
refers for a description to some other  
deed or document (& that document  
describes the land by abuttal or by  
courses & distances. in this case if there  
is no description in the deed of conveyance)  
& the land falls short by any amt of the  
quantity mentioned in the deed the grantor is  
not liable on his covenants, of seizen or warranty.

But if the description by abuttal or by courses. does not correspond with the distances & quantities but does correspond with the monuments or abuttals mentioned, the grantor is not liable on his covenants. And if the distance or quantities are greater than those mentioned in the deed the grantee takes under the deed all the land which answers to the description by abuttals & distances. — Ex the description is land commencing at a known monument running north 100 rods to another known monument. Now if the distance is only 10 rods the grantor is not liable. But if the land is described by quantities without being described by distances & abuttals if the land falls short the grantor is liable on his covenants for here the principal & indeed the only description is that by quantity.

It appears always to have been conceded that in this case the grantor is liable on his covenants unless the quantity is qualified by words of this kind "more or less" or. "so much by estimation" or. There is however no direct decision of this point —

When it is described by abuttal or by metes the words "more or less" added to the description by quantity are of no use at all tho' they are frequently used out of the abundant caution of our conveyancers. for the principle of all the preceding rules is that where there is a description either by abuttal or by metes this description will govern in preference to the description by quantity & therefore tho' the quantity is mistaken such mistake cannot injure the grantor —

Deeds,

6 Wheaton 580

Baldwin

Seymour 8 Com'r



## Deeds

2 Bl 304

4 Br 97

The 1<sup>st</sup> orderly part is the conclusion which includes the date & execution of the deed & it may either mention the date expressly or refer to a date mentioned before in the deed.

4 Br 33

6 Bl 62

4 Br 337

2 Br 193.

6 Br 43

2 Bl 304

2 Br 672

2 Br 4.5

But a date is in strictness no part of the contract it is merely a written memorandum of the time when the contract is made.

A date then is not essential to the validity of a deed & anciently no dates were used in conveyances.

And when the date is inserted it is only prima facie evidence of the time of execution & either party may prove the date to be diff<sup>t</sup> from the one expressed.

6 Bl 46

4 Br 34

2 Bl 304

2 Br 4623

If then there is an impossible date. the time when the contract was made may be proved by parol & a false date may be proved so by parol & the true date may be proved by parol.

Then are all the orderly parts of a deed.



The next & 5th requisite to a deed is the reading of it before execution.

If either party desires the deed to be read before execution & it is not read, as he requests it will as to him be void if he himself is unable to read. & in this case the mere fact that the deed was not read will vitiate the deed.

If on the other hand a party is able to read he then sh<sup>d</sup> read it himself. his request to have it read & a refusal to read it will not make the deed void.

Now a man may be unable to read from various causes. as he may be illiterate or he may be blind &c.

In such case however if he does not request that it be read he will be bound by his sealing. the he were unable to read. he voluntarily in this case waives the reading. — If fraud is practiced in this case this vitiates the deed but actual fraud is not necessary to make the deed void in these cases. & fraud need not be averred. If actual fraud is not necessary to render the deed void where a party is unable to read <sup>that it may be read &c.</sup> & requests if a deed is falsely read to one of the parties it will be void as to him at least as to the part falsely read, unless it is so falsely read by collusion between himself & the party reading for the purpose of defeating it. in this case it will not be void for he may not take advantage of his own wrong.

Deeds

Touch 70:1

2 Bl 374

4 Br 27

2 Co 3. q

11 Co 27

2 Co 296

2 Co 9 (R)

2 Co 96

Touch 70:1

2 Bl 304

4 Br 27

## Deeds

But it may be asked when the deed will be totally void & when void as to the part falsely read?

11b.27.8 If the part falsely read is  
Shp 70.1 so connected with the part correctly  
read that the one ought not to take  
effect witht the other the whole is  
void. As where the deed contains only  
one entire indivisible contract.

On the other hand if one deed  
contains several distinct contracts then  
the deed may witht injury be void  
only in part.

2 M. 6. 26 The 6th requisite is sealing. this is necess  
2 Bl 305.6 at common law to every deed of conveyance  
4. 6m 27 and by the st of frauds & p. signing is also  
Touch 67n necessary.  
60.

It is doubtful whether sealing is  
necessary in this state to a deed of conveyance  
now decided to be necessary.

2 Bl 305.6 It comm. law signing was necessary  
Comyn Dig in no case & sealing became customary  
Fitz 6.1 instead of signing  
Sh Ton 6.

In this <sup>state</sup>, signing is necessary & absolutely  
so in case of a deed of conveyance not only  
by our st of frauds but by a distinct st  
on the subject of conveyances. St 39. 51. St 56. 56.

It deed by be executed by an agent legally  
appointed in all case the execution is to  
be made in the name of the principal  
The most proper mode in this case is this  
A B by his attorney C D. but no particular  
mode is necessary.

Strat 705  
H. Bruns  
960764.  
67R177  
Ed Raym 1415.  
2 East 142

If an atty signs a deed in any other way  
than in the name of his principal he binds  
himself + not his principal

1702181

on 11th 4-7-56 on 13th 56. 7564 on 13 24/7/9 6075

But an atty cannot bind his principal  
by deed or one copartner bind his partner  
by deed without authority by deed one  
partner may however with authority bind his partner  
in notes &c. The reason I take to be founded  
on the doctrine of estoppel. A man cannot  
by another be affected by way of estoppel  
unless he has subjected <sup>himself</sup> to it by matter of  
estoppel.

But this rule must contemplate  
an execution of a deed in the absence of  
the principal. for it has been settled that  
if one man executes a deed for another  
in the presence & by the verbal direction  
of the other the deed binds the principal

This rule is founded on  
necessity for were it not for this exception  
a man physically unable <sup>to affix a seal</sup> to sign a  
deed would be excluded from making  
a deed for he could no more execute a power  
of attorney than a deed itself

Deeds

56.23

Touchy

If several persons are named in the body of the deed as grantors and only one of the persons so named seals the deed it is the sole deed of the person so sealing it. for as to the others it is merely blank paper to them.



Real Property No 16.

Title by deed.

The last requisite to a deed at common law is that it be delivered

And a deed takes effect ~~by~~ its delivery, whatever be the date of it. that is it never vests the estate in the grantee until delivery. & it is true in gin'l that a deed takes effect from delivery.

If then a deed is made & dated Zouch 72  
during the grantor's minority but sealed & delivered  
by him during his full age it will bind him

And even if it be sealed during minority but delivered after he attains full age the deed will bind compro  
him.

And tho' a deed be sealed by a third person yet if the proper party delivers it, it binds him for by delivery he adopts the sealing & is the case may be the signing as his own.

But if a deed is sealed after Touch 58  
delivery it is no deed. for a deed takes effect by  
delivery & as delivered

The act of delivery with words 960137  
is effectual & indeed there need not be any great Touch 58  
formality in the delivery of deeds. Comyn 58

Bro Eli 122.356 Litt 536.49. Fact a3.

And on the other hand there may be a  
an effectual delivery witht any act, by  
words only. as when the grantor said there is my  
deed. take it. This was considered a good delivery  
as when the grantor said there is my  
deed. take it. This was considered a good delivery  
as when the grantor said there is my  
deed. take it. This was considered a good delivery

Deeds Delivery

Touss 58 n 3 as from a table when complete with actual  
1 Leon. 2 140 delivery & with the grantor's express consent  
Comyn Dig there is no legal delivery, unless the jury  
Fast n 3. find that the deed was placed when it was  
by the grantor for the purpose of being  
taken by the grantee. then this will be  
equivalent to a direction to the grantee to take  
the deed.

Direct & strict proof of the delivery  
of a deed is not required for as the matter  
of the delivery is one of little interest to the  
witnesses it is not to be presumed that they will  
remember it. Here acknowledgment before the  
magistrate is prima facie evidence of delivery  
& possession of the deed & of the land granted by  
the grantee is presumptive evidence of delivery.

Shp 57 8 A deed may be delivered to the grantee  
4 Br 15:9 in person or to his agent having authority to  
Perk 137 receive it. or to a stranger in behalf of &  
6 Bamf 671 for the use of the grantee.

4 Kent 455 There is this difference between  
the delivery to a grantee or his agent for here  
the deed takes immediate effect & necessarily  
so but where it is delivered to a stranger  
it may or may not take effect according  
as the grantee afterwards apoints or disapoints.

Shp 60 A deed cannot be delivered to  
Perk 154 any effect more than once. if the first  
4 Br 20:9 delivery is not absolutely void the second  
will be absolutely void as a delivery. for  
a deed cannot begin to take effect at  
two different times.

But if the first delivery is merely void  
a second delivery may be good hence if  
a feme covert delivers a deed & after the  
death of the husband she delivers it again  
the second delivery is good for the first  
delivery was absolutely void & the deed takes  
effect by & from the second delivery.

Perk 5154  
Shep 60  
Comp 201  
4 Br 249  
3 Burr 1805

If a deed once good becomes void  
as by loss of the seal a second sealing &  
delivery will be good. here the deed does not  
take effect at two diff't times for the deed  
witht the seal is as no deed. & the subsequent  
sealing & delivery of it is precisely the same as the sealing  
& delivering of a new deed. The deed indeed becomes  
a new deed.

But if a person under duress or  
one under age delivers a deed & in the one  
case the person under duress & in the other  
the person under age after attaining liberty full  
or full age delivers the deed again. the  
second delivery is utterly void. for the deed  
in both these cases in the first place is  
only voidable. This rule however means no more  
than that the second delivery is void as a delivery  
the second delivery operates to confirm the deed  
& the first delivery. so that the deed when thus  
confirmed by the second delivery is good but  
it does not take effect from the second deliv  
ery but from the first. (see ante page before  
the last)

Perk 5154  
Shep 60  
Roll abt  
4 Br 29  
5 Co 119



## Escrows

Shep 58

4 Cr 29

A deed may be delivered either absolutely or conditionally & this leads to the doctrine of escrows.

If a deed is delivered to the grantee himself or to a third person to be delivered to the grantee absolutely, the first delivery is absolute.

2 B 307.

4 Cr 29.

Co Litt 36a

But if it be delivered to a stranger to be delivered over to the grantee on a contingency, the delivery is conditional & the deed until the contingency happens or until it is delivered over is an escrow. until then it is no deed -

Bro E 520

Shep 59.

Bro E 334

4 Co 137

Co Litt 36a

Hob 246.

Woy 6.

Comod 218.

Bro E 535

Comy Dig Part a 3)

It is settled that a deed cannot be delivered to the grantee himself as an escrow. for the delivery to the grantee must be absolute for the grantor may not prove any thing agt his own delivery. the delivery in law vests the full benefit of the contract in the grantee & cannot be affected by any such hard condition. 4 Cr 36. 1 Root 87. contra but not law.

A bond delivered to arbitrators to be delivered to the prevailing party is really an escrow. And a note of hand ought to be considered in the same circumstances an escrow. for a note of hand has always been considered in law as a deed.



If a grantor on delivery of a deed to a stranger says "I deliver this to you as my deed to be delivered over on a certain condition to the grantee" the deed is not an escrow but an absolute deed & the title vests in the grantee tho' the cond<sup>n</sup> be never performed. — This is a strict & unreasonable rule — The rule depends on the grantor's using the word "deed". 4 Kent C 455. 2. App 2 452. Escrows  
46.137.2  
Shp 59  
46.130  
Cott 362  
Long 263  
Park 1413.44

But where a deed is properly de<sup>l</sup> as an escrow to a stranger it never can take effect until the condition is performed even tho' the stranger should deliver over the deed to the grantee before the condition is performed for such delivery is with authority & a breach of trust.

And in such a case if the grantee in the deed sh<sup>d</sup> force a fraud obtain possession of the escrow. the deed does not take effect. Park 5138  
Shp 59  
46.24.30

These things may of course be proved by parol they are extrinsic facts as every thing about delivery is.

When however on the performance of the condition the deed is d<sup>l</sup> over to the grantee it takes effect absolutely. more if the condition is performed & the depository destroys the deed so. the grantee can still hold the estate granted in the deed. the principle is that now the delivery has by its terms become absolute. the deed in gen<sup>l</sup> takes effect by & from the second delivery that is it does not take effect by relation. tho' there are some cases in wh<sup>ch</sup> it will take effect by relation to the first delivery. as in the case before stated when the depository destroys &c. & then it takes effect so from necessity. Shp 59  
36.356.362  
56.542  
6.512  
16.996.  
46.712  
Cott 310  
Dong 269.  
Park 5138  
56.846.

Escrows  
Relation

Where there exists a disability in the grantor at the time of the second delivery - or an impediment at the time of the first delivery which is removed before the 2<sup>d</sup> delivery the doctrine of relation shall be applied to the case if that doctrine will make the deed valid but that doctrine will be rejected if it would defeat the deed.

36.356

Park 59.140

141.

Shep 72

Bro E 447

1<sup>st</sup> Where in case of delivery to a third person, <sup>which did not exist at the first,</sup> there exists a disability in the grantor at the time of the 2<sup>d</sup> delivery, the deed will take effect by relation — Thus If a feme sole delivers a writing as an escrow & afterwards marries & on the performance of the condition the deed is delivered over, the deed takes effect from <sup>the</sup> relation. ut res magis valeat quam pereat. for unless this doctrine of relation is applied the deed will be void. for with the doctrine of relation it w<sup>d</sup> be delivered while she is a feme covert.

The second delivery is consummatory act & therefore may operate by relation an original act can never take effect from relation. for the original act can relate to nothing but acts of consummation may operate by relation to the first act. for they are executory & Lord Coke says Quia executory relate to the first act & take effect thereby. But suppose a feme sole makes a power of atty authorising Sd to make a deed & marries before the deed is executed the deed is void for the deed here being an original act there is no relation.

If one delivers a writing as an  
escrow & dies & on performance of the condition  
the deed is delivered over the escrow will 360356  
take effect by relation. ut res magis valent &c. Bro 8144  
for unless it took effect by relation it could not  
take effect at all for the death of the grantor  
revokes the authority of the person having the escrow.

In the case of a feme sole & in  
the last case justice plainly requires that the  
deed sh<sup>d</sup> take effect on the performance of  
the condition. but it cannot take effect except  
by the application of the doctrine of relation the  
doctrine of relation ought therefore to be applied.

In the last case that if the 560846  
grantor dying before delivery the deed will Shep 59  
take effect on the performance of the condition  
whether the deed is actually delivered over  
by the depository or not. for as the fraud of  
the depository shall not injure the grantor so his  
fraud or neglect shall not injure the grantee.

Hence if one delivers a writing Beldor &  
as an escrow to a third person to be Carter 189.  
delivered on the death of the grantor 1 Root 3. 163  
to the grantee. on the death of the 2 Root 303  
grantor the deed will be good by taking 4 Day 56.  
effect by relation. it cannot take effect from Wilson &  
the second delivery for the death of the grantor &c. it  
ipso facto destroys the power of the third person

This is a very common method of  
making provision for children. It has been  
objected that this deed being made in  
contemplation of death is a will but it  
plainly does not purport to be a will but an  
absolute deed.

Tit 566  
Co Litt 526  
Bac a br  
auth. p. e.



Executors Relation of one of sound mind makes a deed  
 bro J 572 of feoffment & a letter of atty to a third person  
 16699. to make livery upon it & the feoffor after  
 wards becomes non compos before livery of  
 Touch 72 m<sup>a</sup> seizen is made. & livery of seizen is  
 bro E 447 made during the existence of his insanity,  
 the second delivery to the feoffor will  
 take effect by relation to the first  
 delivery to the depository. The insanity does  
 not revoke the power of atty but still a livery  
 made during the grantor's insanity, either by him-  
 or his atty is voidable at least unless the doctrine of  
 relation is applied - But if one executes a power  
 of atty to another to execute originally  
 a deed of conveyance & dies before the  
 execution of this deed of conveyance the  
 atty cannot execute the deed to any purpose  
 for death revokes all powers of atty &  
 it is impossible to apply the relation to  
 this case. for the execution of the deed  
 is an original act whh can have no  
 relation to any thing.

(16)  
 16699

If one makes a power to another  
 to make livery upon a deed of feoffment  
 and dies before livery made. livery can  
 never be made to any effect. for in the  
 first place death revokes all authority  
 But it has been before said that if a deed  
 of bargain & sale &c is made & d<sup>d</sup> to a third  
 person & then the grantor dies the third person  
 may deliver that deed with effect tho' after  
 the death of the grantor. the reason of this  
 difference is that to a deed of feoffment livery  
 is so necessary that it is not a complete-



conveyance until livery of seizen is made in the case therefore of a feoffment with livery of seizen the deed is not complete but in the cases before stated wh<sup>ch</sup> suppose the deed to be of bargain & sale the deed was complete at the time of delivery to the depository.

2<sup>o</sup> Where a deed is d<sup>o</sup> as an escrow & the doctrine of relation would defeat the deed it will not be applied. Thus if a diseased person makes a lease & delivers it to a third person to deliver it to the lessee who is also out of possession, but to be d<sup>o</sup> to the lessor on the land. here the lease will take effect from the second delivery it could not take effect by the first delivery for then the grantor was diseased & therefore could not convey. to apply the doctrine of relation therefore w<sup>d</sup> defeat the deed —

And this rule holds as a gen<sup>l</sup> rule. This rule however cannot operate so as to violate the privilege of any person who is under any legal disability at the time of the first delivery thus if an infant delivers a deed as an escrow to S<sup>r</sup> with power of atty to deliver it over to the grantee on the performance of certain conditions. & on performance of the condition & when the infant has attained full age S<sup>r</sup> delivers the deed over. the deed takes no effect. for the power of atty is void. Here the doctrine of relation is applied & applied for the purpose of defeating the deed for if it were not applied the privilege of the grantor would be violated for this privilege of the grantor is to govern in preference to the rules concerning relation —

Escrows,  
Relations,

The genl rule then is to repeat it -  
When a deed is delivered as an  
escrow & d? over, the doctrine of relation  
shall be applied if it will make the  
deed valid. shall be rejected if it would  
defeat the deed. but there is an exception  
to the last rule, where rejecting the  
doctrine of relation would protect a  
person in his privilege there it shall be  
rejected.

Picks 125  
Shp 73  
3 Co 36a  
2 Roll 14

3 Co 30a  
Shp 73  
3 Co 29a & b  
Comyn Dig  
Confu. D. 5

But a deed never takes effect  
by relation as to collateral acts so  
as to effect them or be effected by them  
Thus if a bond is d? as an escrow & then  
d? over to the obligee under circumstances  
which would give it effect by relation  
in such case a release of all claims between  
the time of the first delivery & the second  
is not a release of the bond.

A feme sole of full age, makes  
a bond to be d? over to the obligee on the  
performance of a certain condition & then  
marries & then the condition is performed  
now how the bond takes effect by  
relation that is from the time of the  
first delivery, but still if before the deed  
is delivered the second time the obligee  
gives her a release of all claims or even of  
all bonds, this release will not include  
this bond. for at the time of the release  
this bond was nothing & tho' now the bond  
by relation is a bond taking effect before  
the release yet it is only so by fiction.  
& therefore does not include the bond -

This rule of relation only applies for the purpose of resting the title in the grantee from the first delivery & never for the purpose of affecting or being affected by collateral acts, to give another example if of sound mind A delivers an acre to B to be delivered to C on a certain condition. the condition is performed & the deed d<sup>o</sup> to B. in the mean time C Litt 15d. A becomes non compos. now the doctrine of relation 3 Co 29a of relation is applied so as to rest the title in A b7.

B from the time of delivery to B. but not so as to compr. Dig entitle B to an action of trespass agt A for occupying the land Conf. d 5

If a deed is d<sup>o</sup> to A for the use of B to 3 Co 36 (a) 2 Robt be d<sup>o</sup> over to B. writ condition tho' B knew nothing of the deed until delivered over to him yet if on delivery to him he accepts it. the title rests in him from the delivery to A. the grantor is deemed to have assented <sup>at the time of the first delivery</sup> for example a debtor here to a merchant 2 Robt 26 in A's for the purpose of securing this debt makes a mortgage to B the merchant. & in a day after 3 Co 26. 7 the mortgage a creditor attaches this land & 2 Leon. 233 B knows nothing of the deed until a week after 1 Stra 165 made yet if he then assents to the deed he 1 Port 611 15. 4 has the title from the time the deed was d<sup>o</sup> to a third person for his use & if this was before the attachment he holds agt the attaching creditor.

If a deed is delivered to a stranger 5 Co 119 b to be delivered over to the grantee & the 3 Co 26 b grantor on tender of the deed refuses to accept it he can never claim the deed & 260. 1 tho' the depository sh<sup>d</sup> afterwards deliver Bro E 54 it over to the grantee it is no deed & non factum may be pleaded to it. It is a good rule that an offer on one side & rejected 37 E 55 by the other is forever void until a new offer 1 Port 611 15. 4



Deeds.

2 Bl 307

4 Co 31

Co. Litt. 7. 78

2 Bl 308

There is one other thing which tho not  
a requisite to deed at common law is yet  
required by statute in this state & is usually  
added to a deed in Engl?

Attestation by witnesses

Anciently there were no subscribing witnesses  
to a deed even after witness, began to  
be inserted they were merely eye witnesses but  
did not subscribe their names —

In this state all grants <sup>bargains</sup> & mortgages  
of houses & lands must be attested by two  
witnesses who must subscribe their names  
St. Conn. tit 56. c. 1. 56.

St. Conn.

tit 56. c. 1. 50

And by a late statute of houses or parcels  
or for years exceeding one year must be  
so attested <sup>by two witnesses</sup> or they will be void as regards  
strangers. in other purchases or credit.  
& these witnesses must be subscribing witnesses

Certain other requisites prevail in  
this state & in most of the U.S.

St. Conn.

tit 56. c. 1. 57

All grants of houses & lands &  
mortgages of the same must be acknow-  
ledged before a justice of the peace or  
before a judge of one of the Cts with  
this acknowledgment the deed is  
incomplete & by a late statute leases for  
life or years <sup>not exceeding one year</sup>

St. Conn.

tit 56. c. 1. 50

are valid only as between the parties.  
(deeds of bargain & sale are also within this  
provision)

But there is still another requisite to the validity of deed. that of recording and this is a requisite in nearly all the states

By our statute all sales or mortgages of houses & lands must be recorded or *Tit 56. c. 1. s. 4.* it will not be valid against creditors or purchasers. without recording however they are *Chib 72.* good against the grantor & his heirs. This record is to be made at full length by the town clerk of the town where such houses or land lie

The object of this statute is to give notice to strangers of the owner of every piece of land in the state.

And under this statute when there are two deeds of the same property the deed first recorded will *prima facie* hold the land in preference even to a prior deed. but now the deed first noted & recd by the town clerk will be considered as recorded first for (see post) the town clerk on receiving a deed is to note on the deed the time of receiving it & the record is to bear the same date.

But this rule does not hold if *1 Root 385* the prior purchaser uses due diligence *500.* to procure his deed to be recorded for *2 Do 239* a grantor must be allowed a reasonable time to get his deed recorded.

## Deeds

1 Root 358

500.

2 Do 239

287.

12 Nov 46

But if the prior purchaser does not within a reasonable time procure his deed to be recorded a subseqt purchaser whose deed is recorded before his will hold in preference to him. & so an attaching creditor first recording

In these rules I have supposed that the subseqt purchaser had <sup>no actual</sup> notice of the first deed <sup>at the time of purchasing</sup>. It is however said to have been formerly decided that a subseqt purchaser in the case *ut supra* even tho he had actual notice w<sup>d</sup> hold the estate.

Comp 712

1 Nov 66

1 Fonb 23

This is the rule adopted in Eng<sup>l</sup> in the registering counties in law but not in Equity. for if the subseqt purchaser had actual notice

The rule adopted at law in England is wrong. & the rule in Equity ought to be adopted in law. for the question is merely a question of construction. if the statute & the same construction ought to be made in both Courts & even the judges of the courts of law acknowledge that the CG of equity construe the statute correctly. In New York it has

10 John 455

8 do 157.

been decided in a lot of law that a subseqt purchaser with actual notice shall not have a priority over a prior purchaser whose deed is not recorded. even tho the prior purchaser does not record his deed within reasonable time

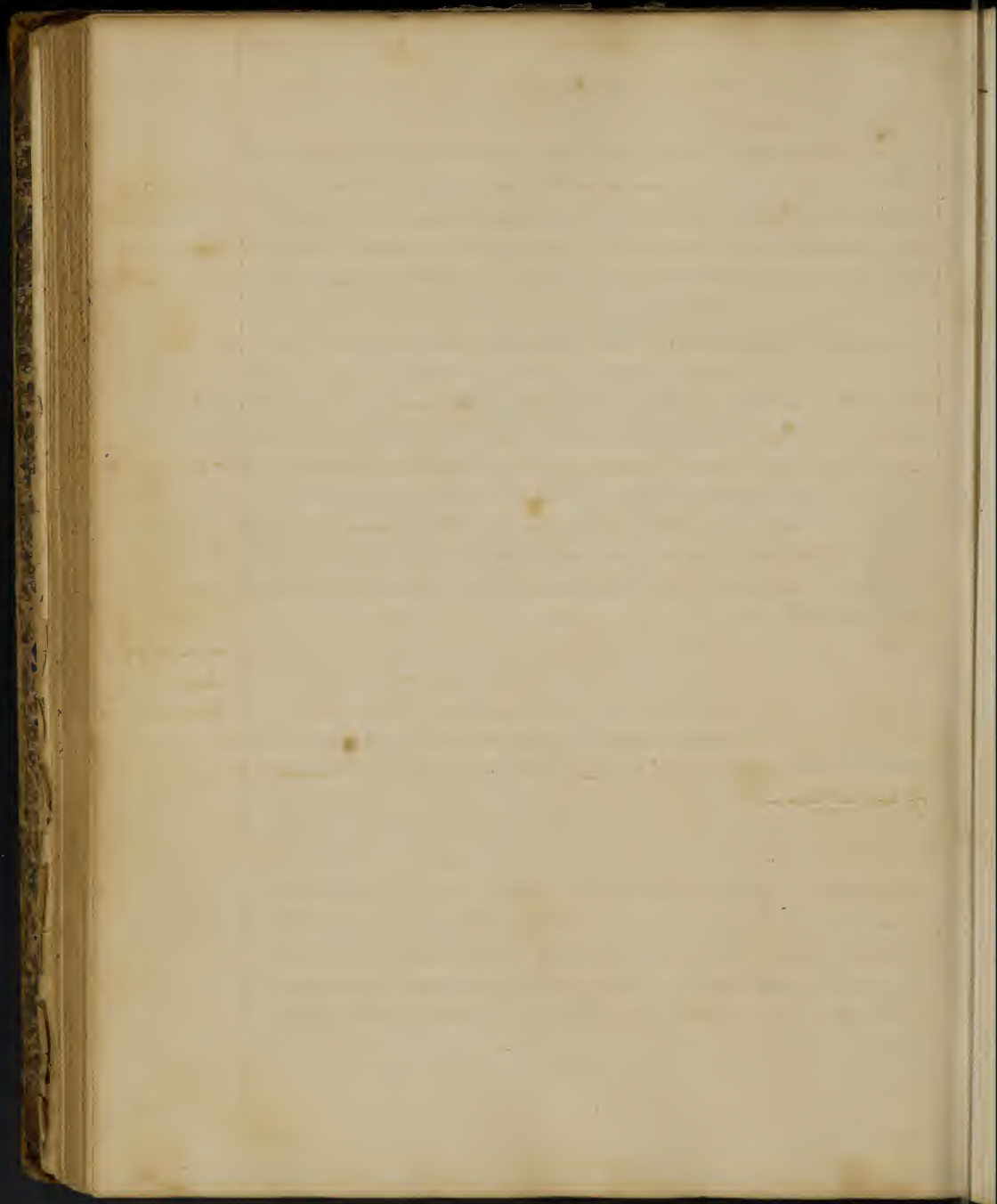


The true principle is this a subsequent purchaser shall not hold to the exclusion of a prior purchaser tho he procures his deed to be recorded first if the first purchaser has been guilty of no neglect nor even then if the subsequent purchaser had notice of the prior purchase - for the object of recording is only to give notice & notice in the case supposed the subsequent purchaser has.

If a town clerk having rec<sup>d</sup> a deed 2. Root 55 for record & delivers it back even at the St Court request of both the parties the town clerk is liable to the party injured by the want of <sup>the</sup> conveyance being recorded as to a creditor who has attached the land as the property of the grantor - or to a purchaser from the grantor &c,

There are various rules of construction peculiar to Court which are here omitted

When a deed is rec<sup>d</sup> by a town St Court clerk he is to note on the back of the deed the time when it was rec<sup>d</sup> & his record of the deed at large must bear the date of the time when the deed was rec<sup>d</sup>.



Real Property (Vol 1)

Title by deed.

Now a deed may be avoided or destroyed.

If an instrument wants any of 2 Bl 308 the requisites of a deed it is of course no deed. Here indeed the instrument never was a deed. It may be evidence but it is no deed. But a deed may be destroyed by some 11 b. 27 things ex post facto as by rasure. interlineation 2 Bl 308 &c. or by other alteration in a material part after the delivery

If interlineations<sup>&c</sup> are made before deliv 2 Bl 308 ory they do not invalidate the deed provided 4 Br 36. 26. a memorandum of it is made either at the Touch 55 time of execution or delivery at the foot of the deed

But the rule of the common law 10 Co 92 was that any such erasure or interlineation <sup>2 Bl 308</sup> unless noted in the deed made the deed void 2 Bl 308 of course. but now it is left to a jury to determine whether the erasure or interlineation<sup>&c</sup> was made before or after the execution or delivery of the deed. & if the jury find that the erasure<sup>&c</sup> was made before delivery the deed will be good. & prima facie the erasure was made at the time of execution - But there is a difference between 11 Co 27 a an alteration made after delivery by the grantee & one made by a stranger. if after 2 Bl 129 delivery the grantee or the person to whom the deed is delivered alters the deed in the most immaterial point the deed is void.

This severe rule is made to prevent the grantee from at all tampering with the deed -



## Deeds.

11 Co 28.b.

Shep. 71

2 Roll 30

Gill & Co 106

Where an alteration in a deed is made by the grantor the whole deed becomes void tho the deed contains several distinct contracts.

11 Co 27.a

bro E 626.

2 Roll 19

2 Bulst 247.

But an alteration by a stranger does not destroy the deed unless it is made in a part material. for here the grantor is not in fault.

6 East 309)

4 Cr 450

contra.

But if the deed is altered in a material point wicht the privity of the grantee the deed is void. - for here the deed can be in no sense the deed of the grantor

But is the grantor to loose the benefit of the deed? I trust not the deed is not indeed now the deed of the grantor. the deed is precisely the same as if the deed was destroyed by time or casualty. & if by parol evidence the grantee can show what the deed originally was a b of Eq. would probably decree

5 Co 119 a new deed. And in these cases the grantor

11 Co 27.a may plead non est factum. for it is

bro E 626 not his deed as it now his deed stands.

"

Gill & Co 106.7

2 Keb 581

2 Ser 35

bro E 627

1 Vent 185

4 Cr 29.

2 Keb 872.81.

If a blank is left in a writing intended as a deed & that blank being a material point is filled after delivery the writing is no deed. but if the blank is immaterial. & it is afterwards filled up the deed is still good. for the deed would have been good had it not been filled up.

By an immaterial alteration is meant.

If a stranger destroys a deed in any way without authority the grantee may maintain an action agt the stranger. for the stranger destroys the grantee's evidence of title. & this action may be maintained whether the grantee actually loses the title by this destruction of the evidence of title or not.

Br. & 626  
But of recovery  
as this money  
deed will not  
prevent the claim  
in law or equity  
as the grantee  
the two actions  
are diverse  
intention-

Again a deed may be destroyed by breaking off the seal. even tho it was broken off by casualty. Thus when the seal was broken off by a mouse the deed was held to be void

5 Co 23  
2 Bl 308  
2 Show 29  
11 Co 286  
Doe plac 259

(see vide & am 496. H. 1. Gallison R 69 / Palmer & Br. Eliz 546) 262.

In such case however as no alteration is made in the <sup>body of the</sup> original deed a Ct of Equity will no doubt regard the writing as an executory agreement & compel the grantor in such case to make a new deed of the same tenure as the former writing. This they may do either under their power to relieve agt casualties or under their power to enforce executory agreements.

A deed again may be destroyed by the grantee's delivering it up to the grantor to be cancelled. This rescinds the original delivery.

If two are jointly or jointly & severally bound by a deed & the seal of one is lost the Deed is void as to both - for now the deed if of any validity, must be the sole & several deed of A. whereas originally the deed was either joint or joint & several

2 Bully 248  
11 Co 27 (a)  
Cr. Est 46

## Deeds

Shep 6870) A deed may be avoided by the subsequent dissent of those whose concurrence is necessary to the legal operation of the deed. Thus if an infant makes a grant & dissents after coming of age the deed is void. & the same where he is grantee.

By a subsequent dissent is meant the refusal of an assent which was originally necessary. It does not mean that a bare dissent after a valid deed has been made even by both parties will make the deed void. in this case there must be a reconveyance: something as high as the conveyance according to the maxim *ex ligamine se.* -

1 Vern 348

2 Bl 309

2 Powne

143-163.

A deed may, finally, be destroyed by the judgment of a Ct of law or the decree of a court of Equity.

If the system of conveyancing in England were adopted here it might be necessary to mention all the different kinds of deeds. but in this state & in most of these states our mode of conveyance is much more simple.

2 Bl 309-343.



### Construction.

Deeds are to be construed as near  
the apparent intention of the parties as  
the rules of law will permit.

4 Brn 415  
60 Litt 36a  
3 Atk 136  
Plowd 184.

Bad english or false grammar  
will never vitiate a deed provided the  
sense can be discovered.

4 Brn 416  
Shep 87  
9 Co 48a

The construction of every instru-  
ment is to be made upon the whole  
instrument taken together & not from  
one part taken alone.

"Nosatur a sociis"

And the construction must be  
so made if possible that every part  
may take effect. It is a strong objection  
to a construction of an instrument that it does  
not give effect to every part. —

4 Brn 416  
How 160-1

It is a genl rule that the words  
of a deed are to be taken most strongly  
in construction as the grantor or the  
party whom words they are. but this  
rule ought to be applied only where  
there is an ambiguity. for he who  
uses the words should explain himself

Shep 87:8  
4 Brn 416

Deeds. constr. If two clauses are irreconcilably repug-  
nant the former will take effect & the  
latter be rejected. as if there are two  
distinct deeds the first will take effect to  
the exclusion of the second.

In construing releases or deeds of acquittance there is a rule of construction peculiar.

Where genl words of release stand alone they are to have their full effect but if they are preceded by a recital these genl words are to be restrained to the subjects of that recital. Thus Rec<sup>d</sup> of a B five pounds in full of a certain note & of all demands the words "of all demands" are rejected for they are supposed to be put in merely for form.

But if the release were this Rec<sup>d</sup> i.e. "in full of all demands" this ye<sup>t</sup> will extend to all demands.

Where words will bear two constructions of which one is agreeable to law & justice & the other not so the former construction will stand & the latter be rejected.

2oth 135  
4bm 418

Words repugnant to the genl tenor of the deed & to the evident intention of the parties are to be rejected & hence it is that an exception in a deed including the whole of the thing granted is void & the deed stands. The genl intent shall govern in exclusion of a particular intent where both cannot stand.

When a principal is granted all the Deeds  
necessary incidents pass with it even with- Shep 89  
the words "all the appurtenances" which are Litt 5522  
usually indeed inserted. 229.

Thus if one grants a house he of H Co 56:7  
course grants with it a right of way to the house 2 Bl 176.  
If he grants a mill he of course grants with it  
the privilege of water to carry the mill.

When any subject is granted all the 2 Bl 36  
means necessary to the enjoyment of it Co Litt 56, 143  
pass with it. Thus if one grants to another Shep 89  
a piece of land in the middle of the  
grantor's farm a right of way is tacitly  
granted with it over the grantor's farm to  
the piece of land thus granted.

A writing drawn in a form in 2 Co 35, 12th 117  
which it cannot by law take effect may Shep 81:2  
operate as if it were in another form for H Co 420:9.  
the purpose of effecting the intention of Co Litt 301  
the parties. Thus. If one makes a deed of Comp 579:601  
bargain & sale in consideration of kindred 3 Lev 372  
it will take effect as a deed of covenant Plowd 140.  
to stand seized & may be pleaded as Perk 568  
such release & v. vera. So payment by one pt to the other may  
operate as a release. A covenant never to sue a debtor 40 R 472  
may be pleaded as a discharge of the debt. - 1 H Bl 614.

Where the terms of a deed are H Co 6313  
so uncertain that the intention cannot 4 Co 425  
be discovered it is void. Thus a grant to  
A or B. is void. or Thus a grant to one  
of the children of J.S. JS having several  
children - A grant to the best man in  
a village &c. & if the deed in this case ngs d to  
A or to the eldest son &c this w. not cure the patent ambiguity -



## Deeds

- In some cases a deed being originally void in part will make it void in total. in others not — If a deed contains several covenants some of wh<sup>ch</sup> are illegal by the common law & some not. part are good & part bad.
- 11 Co 27b But where any one covenant in a deed is made void by statute law the genl rule is that the whole deed is void: vide it "contracts"
- 2 Mil 351 The reason of this difference is that the phraseology of the statute almost universally is such that the whole deed must be void
- 45b 14 If there are several distinct <sup>in one & the same deed</sup> contracts, some of wh<sup>ch</sup> are falsely read & some truly the deed is said to be good as to the latter & void as to the former.
- 1 Pow 299 But neither this rule nor the former hold where the diff<sup>t</sup> contracts are mutual considerations the one of the other. Q. if by the terms one depends upon the other or is a condition of the other the one cannot be void unless the other is also — the rule w<sup>d</sup> otherwise work the grossest injustice —
- 11 Co 27b If two distinct obligations are written upon one paper & the one is falsely read & the other truly read. & the contract is duly executed the one is certainly then void & the other good.
- 2 Co 3. 147b If a deed is void in part as to an entire sum of money or any entire thing it is necessarily so in total. — If A agrees to give to B a bond for twenty shillings — the scrivener draws a bond for 20<sup>£</sup> & reads it for 20s. it is a void bond for 20<sup>£</sup>. or for 20s. —

If a conveyance is made to two persons  
+ one of them depends. the part intended for  
the party depending remains in the grantor.

2d ed. 345

3 Co 27: 8

Comyn 2

1 R 2 7: 2

1 R 2 349

(ante)

This is diff<sup>t</sup> from the case before  
stated where a deed is made to two persons  
one of whom is legally incapable of taking  
in all cases the whole goes to the grantee  
who is capable of taking, thus a deed to  
A + to an alien enemy gives the whole estate  
to A. for in this case the deed is in its creation  
in law a deed to A alone, but in the other the  
deed is originally to two persons but voidable as  
to either of them upon his death. In its legal  
effect in its creation it is not a deed to one  
alone -

### Title by Execution

By the common law + by our inst in things  
real may be acquired by execution + by our st law the  
very of execution has become a common mode of  
acquiring title to lands -

By the common law only three execution  
viz Fieri facias. levari facias. + capias. 3 Co 11. 12  
satisfaciendum. That is then were the only ones 3 Ed 4 14-15  
which were issued ag<sup>t</sup> the person of the debtor Comyn 2  
in personal actions. - Bac abr. ex<sup>t</sup>. c 3. Ex<sup>t</sup>. c 1. 2. 3. 9

Executions in actions real are not  
modes of acquiring title. for in these actions the  
title is supposed to be in the Property Pl<sup>y</sup>.

On the fi. fa. only the goods +  
chattels personal + real can be taken but  
the person cannot be taken nor can the  
real property except chattels real - This ex<sup>t</sup>  
issues only as goods + chattels - 3 Ed 4 17. Ex<sup>t</sup>. 4.  
C 24 16.

2 Bac Ex<sup>t</sup>. c 3

3 Co 12

8 Co 171

Comyn 2

Ex<sup>t</sup>. 4.

C 24 16.

## Executions

The property thus taken on this ex<sup>n</sup> is to be sold by the sheriff for the satisfaction of the ex<sup>n</sup>.  
3 Bl 417. 8 Co 171. Comyn Dig ex<sup>n</sup> c 4.

Comyn Dig On the lex: fa: the sheriff may take not only the chattels, but the profits of lands as the growing emblemments but fi fa does not extend to emblemments.  
Ex<sup>n</sup> c 3.  
3 Co 116.  
Bac abt.  
Ex<sup>n</sup> c 4 Comperbush 470. 3 Bl 417.

(H.) On this ex<sup>n</sup> may also be taken rents due to the debtor that is the lessee of the debtor may on this ex<sup>n</sup> be compelled to pay rent to the creditor instead of paying to the lessor, the debtor; The rent is regarded as the growing profits—  
2 Bac ex<sup>n</sup> c 4. On these two ex<sup>n</sup>s all the chattels whether personal or real & also the profits of land  
3 Co 12. may be taken & indeed every thing except land & necessary wearing apparel.  
Compl 356

Comyn Dig But on neither of these can the debtor's land  
Ex<sup>n</sup> c 4. be taken for they extend in terms only to his  
3 Co 13 personal estate,  
Bac abt ex<sup>n</sup> c 4.

3 Bl 413

There is at common law no ex<sup>n</sup> issuing ag<sup>t</sup> the land of the debtor while the debtor is alive. but such an ex<sup>n</sup> may be issued ag<sup>t</sup> the heir. — this rule is founded on feudal principles. for to subject to ex<sup>n</sup> p<sup>r</sup> make indirect alienation

Salk 365

1 Roll 591

Comyn Dig

Ex<sup>n</sup> c 4.

For at common law <sup>is there</sup> ~~there~~ any ex<sup>n</sup> whl reaches fixtures belonging to the debtor as fences. doors windows &c. as these tho strictly personal are still annexed to the freehold.

There are a great variety of things concerning whl there has been much question whether they belong to the realty or personality see Tithe "executors". suffice it say here that those articles whl are not deemed fixtures may be taken in ex<sup>n</sup>.



The third ex<sup>te</sup> by the common law is the ca: sa: under this writ the body & the body only of the debtor might be taken. but this ex<sup>te</sup> could only be allowed at com law when the injury for which the ex<sup>te</sup> was issued was a forcible injury.

It was alleged in these cases on acc<sup>t</sup> of the breach of peace <sup>which</sup> is involved in the injury.

The King indeed was in all cases allowed this writ on acc<sup>t</sup> of his prerogative.

But by the 24 of Mabbidge, 52 Henry 3. of 112, 13 Ed 1<sup>st</sup> + 25 Ed 3. the writ of ca: sa was extended to actions not sounding in force & to nearly all civil actions.

But on a judg<sup>t</sup> aft the heir at law on a bond of the ancestor the creditor might at com law have an ex<sup>te</sup> aft all the lands w<sup>th</sup> the heir has by inheritance from the indebted ancestor. 3 Bac 84.

This right of the creditor was founded on the necessity of the case. It was the only case at C & I in w<sup>th</sup> lands c<sup>d</sup> be taken on ex<sup>te</sup> -

In this case however the ex<sup>te</sup> issues only aft the land w<sup>th</sup> the heir has by inheritance from the indebted ancestor & not aft either the body of the heir his personal property or aft the real estate w<sup>th</sup> the heir may have obtained by purchase &c.

But in this case the land is only extended that is given to the creditor until the rents & profits shall satisfy the debt.

But in virtue of certain English stats real estate may now be taken on ex<sup>te</sup> aft the original debtor himself. 1 W 2. 13 Ed 1. this entitles the creditor to take half the debtor's land & is called "eleget". This ex<sup>te</sup> issues aft goods & chattels & half the land. in this case

## Executions,

3 Co 12  
6. Litt 289. 906

Compulsory  
Ex<sup>te</sup> 63. c. 9

Bac abri  
ex<sup>te</sup> 23.

2 Bac 328. 9  
3 Co 12 to

3 Co 12 -  
5 Co 88

Bookitt 596  
Comyns D & C. 9

3 Co 12 a  
Compulsory

Ex<sup>te</sup> c. 2  
Plea 2 c. 6

Plow 440. 1  
3 Co 12 a

3 Co 12 a

Plow 449 440  
Comyns D

Ex<sup>te</sup> c. 2  
Plea 2 c. 6

Plow 439.

Plow 439

Execution Under this st the goods chattels & real estate

2 Bl 161 are not sold but appraised off to the cred:

3 Bl 418 but in this case the real estate is only extended

Comyn D that is it is to be taken by the creditor until the

Ex c 14. debts & profits satisfy the debt. the fee does not pass

2 Bl 161 There are two other english statutes i.e. mercer

3 Bl 420 13 Ed 1 & 27 Ed 3<sup>d</sup> which subject all the lands

2 Bl 160 as well as the body & goods & chattels on the

Fitz 131 forfeiture of the recognizance by statute mer

& staple but on these statutes also the land

is only extended & indeed there are no ex<sup>ts</sup> in

england by which the fee of land passes to the creditor.

In this state & in this country the  
a simple or any smaller int<sup>er</sup> in lands may  
be taken in ex<sup>ts</sup> & the title to such int<sup>er</sup> will pass.

In this state there is but one

species of ex<sup>ts</sup> in personal actions & that issues

ag<sup>st</sup> the body lands & personality of the debtor

altogether - & either of these as the case may be may

be taken, where goods are taken they are by our

stat. to be sold at the end of 20 days & a sale

before or after that time is illegal except by

adjournment.

It is provided in our st that if suff<sup>er</sup>  
personal property to satisfy the ex<sup>ts</sup> is tendered

to the sheriff he cannot take the land & the

sheriff must make demand of money before he can

take any thing - <sup>It is necessary to supply his deficiency</sup> it has been a question much litigated

2 How 166 whether money can be taken on Ex<sup>ts</sup> notes bills

3 Co 11. of exchange - we cannot be taken. the english

Song 219 authorities are in favour of taking money. the

230. ex<sup>ts</sup> does not mention money

Arm 27 Phelpot.

Hard 448. (9 East 48. contra) & East 511. 2 NR 370. 4 1000 was given

In this state it has been determined that money, Execution  
may be seized on Ex<sup>or</sup> Our Ex<sup>or</sup> mentions monies. 1 Rest 216

A branch it is held that the money 1 Branch 116  
in that case could not be taken because it 134  
had not become specifically become the money  
of the Deft. but it appears to have been admitted  
that if it had been the money of de it might have been  
seized — There is a provision in the English 4 TR 633  
law that if the Shff is doubtful whether the 648.  
goods belong to the debtor he must summon 1 Bur 29  
a jury to determine the fact. & if the jury 1 BL R 65  
find the goods not to belong to the Deft 2 H BL 438  
in the ex<sup>or</sup> the Shff is justified in omitting to  
take them but it answers no other purpose 2 H BL 437  
it is no evidence for or ag<sup>t</sup> the real owner Parker 85  
But it seems that the jury find that the goods belong to the Deft & they do not the Shff is liable to the owner 3 Collagdelw 175 1 Stra 68

And if a Shff makes a wilfully false & del<sup>us</sup> return of nulla bona. this inquiry will 175.  
not justify him. tho' if he is guilty of no  
fraud this inquiry will justify him in  
omitting to take.

We have no such inquiry in the  
rule in our state is if in an action ag<sup>t</sup>  
the Shff for not taking goods it appears  
that there was not sufft ground for the  
Shff to doubt whose goods they were. the  
Shff is excused.

If the Shff in the first place takes Bac a b  
goods will are not sufft to satisfy an ex<sup>or</sup> he may. ex<sup>or</sup> E.  
seize more goods & so on ad infinitum — Comyn Dig  
1 Siderfin 91. ex<sup>or</sup> L



## Executions

Under our st as has been before stated all the lands &c of the debtor whh he holds in his own right are subjected to ex<sup>co</sup>

By "his own right" here is meant holding a beneficial interest, this is diff<sup>r</sup> from the meaning of <sup>the expression at</sup> the common law. In our statute it means all lands except those whh the debtor holds as trustee. - As Husbands interest in wifes land

1 Day 93:6 may be taken - Our st extends to all interests even

2 Rest 15: to equities of redemption. i.e. common law contract

8 East 467. 2 new R. 401. - No interest merely equitable can be taken by

2 Rest 15: a common law and the mode of setting off an interest in lands on ex<sup>co</sup> is the same whether the int<sup>r</sup> is a fee simple or a life estate.

1 Rest 41

1 Rest 211

Before land can be taken on ex<sup>co</sup> the shff must make demand of the debt at the usual place of abode of the debt<sup>r</sup> if within his precincts & if real estate is taken without such demand no title can be acquired by the levy & the rule is the same where the shff takes land after tender by the debt<sup>r</sup> of money or suff<sup>r</sup> personal property to satisfy the debt.

And the previous demand must appear in the shffs returns. if not no title vests.

except the returns made before the 1<sup>st</sup> of Aug<sup>r</sup> 1800.

2 Rest 14:4

1 Day 109

The land taken is to be appraised by 3 indiff<sup>r</sup> freeholders of the town where the land lies & to be set off on this appraisal to the 1<sup>st</sup> & is not to be sold.

The word undiff excludes all persons related to Executions  
either of the parties in a degree nearer than 1 Day 109  
Uncle & nephew from being appraisors.

The Shff must cause the ex<sup>r</sup> with 1 Root 489  
an endorsement of all his proceedings upon 557  
it to be entered on the records of the town,  
+ <sup>must return it</sup> to the office of the C<sup>r</sup> whence the ex<sup>r</sup> issued  
to be there recorded.—

But a recording in one of these  
places is not suff<sup>t</sup> to vest the title—

If the Shff tender the amt of the ex<sup>r</sup> + costs before  
the ex<sup>r</sup> is entered for record the Shff is bound to accept  
the money— Under our law there is no such thing  
as extending an ex<sup>r</sup> on land; the whole inst  
of the debtor must be taken + set off to the creditor

5 Day 207

With regard to the mode of taking  
growing emblements. The usual mode is  
to seize on the ex<sup>r</sup> a growing crop + then  
for the Shff to sever the crop & sell it  
as personal property. this course appears  
to be improper. the proper mode is when  
the owner is tenant for a season to  
take the whole inst of the lease + to  
appraise it on ex<sup>r</sup> then of course the  
crop might be severed by the creditor.

Under the life in Engl<sup>d</sup> the former mode may be  
proper but not under our ex<sup>r</sup>— Comyn Dig ex<sup>r</sup> c 4.  
Salk 368.

1 Root 557

Smith v  
Starkweather  
1811— 5 Day.

This rule is  
not applicable  
to the whole proceed-  
ings under the  
ex<sup>r</sup> have relation  
to the first not  
to the Shff then  
proceeds by the  
doctrine of  
relation the  
land will have  
been sold off  
+ a bill regularly  
vested before  
the money is tendered

1 Root 101

Under our Stat the ex<sup>n</sup> must be made returnable within 60 days after date or to the next term of the Ct. (in case sixty days are remaining between the next court & the date of the execution)

But the words of ex<sup>n</sup> may be returnable according to law & where the ex<sup>n</sup> is by a single magistrate this means 60 days but where by a Ct. whh holds regular terms it means to the



Real Property. (Title by Ex<sup>r</sup>) (c 18)

It has been determined under our law that a levy of an ex<sup>r</sup> on land after the time when it is required by law to be returned is void. the ex<sup>r</sup> after the time for its return is then of no effect as an ex<sup>r</sup> unless it is renewed

3 Day 1

1 Root 101

And any off<sup>r</sup> who does not return the ex<sup>r</sup> within the time limited he is liable to an action on the case in favour of the Plf. in the ex<sup>r</sup>. In Engl<sup>d</sup> secy.

If however a levy is begun before the 160396 day of return the consumation by relation will be good. tho' made after the day of return. 4607110

Ex gra. goods seized on the last day of the ex<sup>r</sup> may be sold 20 days after & the service is good. 500269

The levy of an ex<sup>r</sup> on land does not oust the def<sup>t</sup> of possession it merely vests the title in the Plf & if the def<sup>t</sup> refuses to quit the premises the Plf must bring his action for the purpose for the law will not allow the def<sup>t</sup> to be ousted witht giving him an opportunity of questioning the proceedings on the ex<sup>r</sup> - So the grantee cannot forcibly turn the grantor out of poss<sup>n</sup>. - See 555. (1442).

2 Show 85  
with regard  
to chattels it  
is otherwise

An alias ex<sup>r</sup> will in gen<sup>l</sup> be issued of course & the blk of the 1<sup>st</sup> may do it unless there has been a great lapse of time since the return day of the ex<sup>r</sup>

Where an ex<sup>r</sup> is endorsed satisfied the Plf may obtain a new ex<sup>r</sup> on a scire facias if the levy in consequence of which the ex<sup>r</sup> was endorsed satisfied was void but he cannot do this on motion witht a scire facias.

1 Root 453

500269

500567

40660

Bac ex<sup>r</sup> do -

Satch 193

## Execution.

If the def<sup>r</sup> in an ex<sup>n</sup> dies in prison or escapes or if an ex<sup>n</sup> is superseded by a writ of error if the judgment is affirmed a new ex<sup>n</sup> may be had — but it cannot be had withe a scire facias

Bac abr  
ex<sup>n</sup> h  
Lenth 30  
Broj 364  
Comyn Dig  
Plea 36. 1122  
Ex<sup>n</sup> i 4.  
The time limited by the common law for the taking out of ex<sup>n</sup> after judgment is a year & a day that is after this period the ex<sup>n</sup> will not issue of course tho' after this the ex<sup>n</sup> may be taken out by scire facias. The reason why after this period has elapsed a scire facias is necessary is the presumption that the debt is paid. In one state no precise time is limited & ex<sup>n</sup> is frequently taken out witht<sup>n</sup> <sup>after judgment</sup> years after judgment. By St M 2 13 Ed 1. this scire facias is given in personal actions but in real actions this scire facias may be given at common law.  
Comyn Dig  
Plea 36. 1122  
Bolt 290  
Salk 258.

Comyn Dig  
ex<sup>n</sup> c  
Plea 36. 115. 13  
Bacon abr  
scire facias  
1. Note 53.  
In a real action if the Plf dies before ex<sup>n</sup> <sup>after judgment</sup> a scire facias may be prayed out by the heir at law in personal actions if ut supra ex<sup>n</sup> may be had by a scire facias from the executors. The reason why scire facias is necessary in this case is that it is not apparent who is heir or who is executor & this question can not be tried on motion or by the clerk of the court. a scire facias is then necessary for the purpose of trying the question whether he who brings an ex<sup>n</sup> is truly the heir or executor.

But in either case if the Plf dies after Execution  
ex<sup>t</sup> sued out but before it is satisfied then due a b  
ex<sup>t</sup> itself may be executed & there is no need ex<sup>t</sup> c 4  
of a new ex<sup>t</sup> or of a scire fac: - The ex<sup>t</sup> was Com<sup>o</sup> & Dy  
here properly issued. and the death of the C<sup>r</sup> is ex<sup>t</sup> f  
no supersedeas - Salk 322 plea 3 L 1

On to whom shall the shp pay the money in the ex<sup>t</sup>?

If a judgt is rendered ag<sup>t</sup> two persons saym<sup>o</sup> 26  
& one of them dies before ex<sup>t</sup> issued an ex<sup>o</sup> due a b  
can<sup>o</sup> be had ag<sup>t</sup> the survivor with a scire fac<sup>o</sup> ex<sup>t</sup> g l.  
fa: & the reason is that with a sc: fa. 1 dett 42/123  
the record w<sup>d</sup> be inconsistent fa on the record & s<sup>o</sup>.  
with sc: fa: It appears that judgt was rendered ag<sup>t</sup> Com<sup>o</sup> & Dy  
two & ex<sup>t</sup> issued ag<sup>t</sup> one but with sc: fa: the whole plea 3 L 13.  
is explained

The same rule holds when one of two  
plf's dies after judgt but before ex<sup>o</sup> issued &  
fa the same reason -

If judgt has been rendered ag<sup>t</sup> one who dies before ex<sup>o</sup> & the heir has <sup>in f<sup>o</sup> by descent</sup> lands ex<sup>o</sup> or  
scire fa. may be had ag<sup>t</sup> the lands of the heir? Com<sup>o</sup> & Dy  
do not say

This however is one of those cases in which if the heir is an infant the proceedings on the sc: fa: must be stayed until the heir attains full age. or as the legal phrase is "the parcel must demur?" 1 Roll 140



## Executions

Comy & D. But the Olf may in this case if he  
Ex<sup>r</sup> p. pleases by sci fa: sue out ex<sup>r</sup> ag<sup>t</sup> the personal  
representatives instead of suing it out ag<sup>t</sup> the  
plea 3l. 6. heir -  
Bac<sup>r</sup> abt. ex<sup>r</sup> q 2.

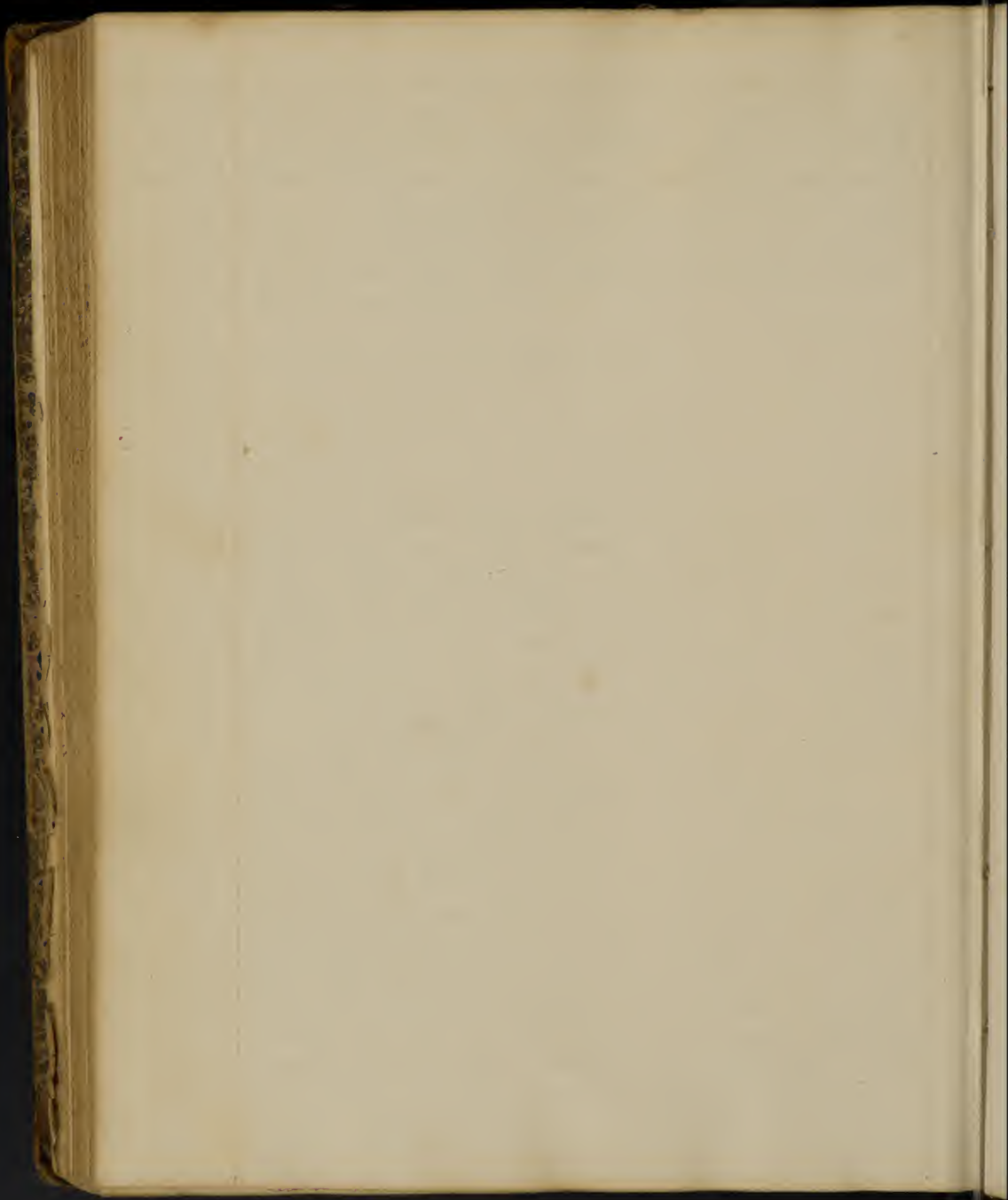
But if the judge had been rendered &  
Comy D. ex<sup>r</sup> issued before the death or the det<sup>r</sup>. It may  
ex<sup>r</sup> d<sup>r</sup> 24<sup>p</sup> then be executed.  
Gro E 181

2 Ven 218. Bac abt ex<sup>r</sup> c 4. 1 Leon? 144.

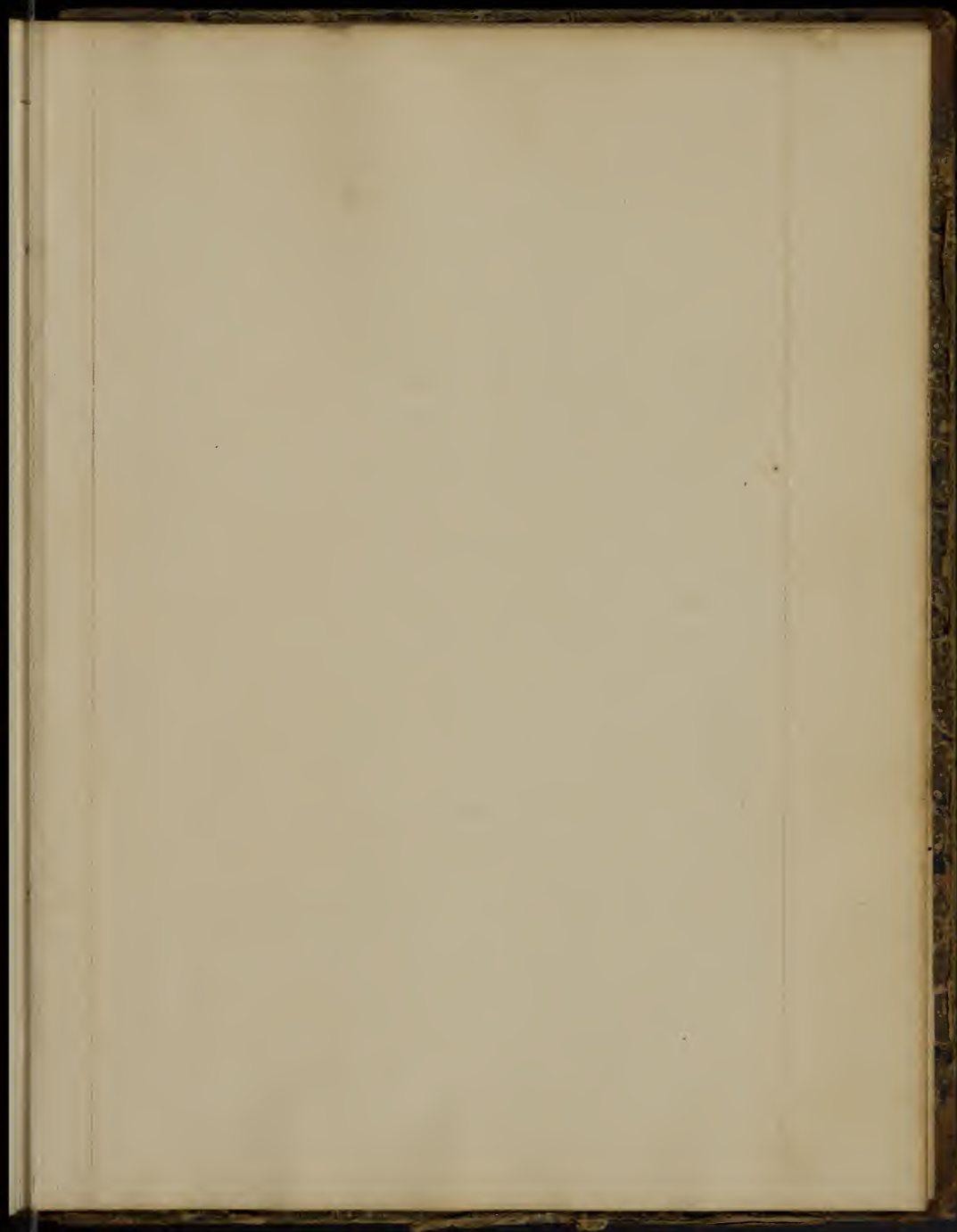
But then these last rules cannot  
obtain in this state here if a man  
dies after judge rendered & before ex<sup>r</sup> or  
after ex<sup>r</sup> but before satisfaction. neither  
in the one case can a new ex<sup>r</sup> be obtained  
in any way. or in the other can anything  
be taken on the unsatisfied ex<sup>r</sup> for this  
is ag<sup>t</sup> the spirit of our laws whh distribute  
equally the property of a person deceased  
among all his creditors of whatever  
discription. the ex<sup>r</sup> must in this state go  
tho a course of administration precisely like a  
bond or book debt whh had not been sued for  
it cannot be ascertained before hand whether the  
debtor died insolvent or not & if he died insolvent  
if in the one case ex<sup>r</sup> could be obtained or in the  
other property could be taken on ex<sup>r</sup> then this judge  
creditor would get his whole debt while the other  
creditors would obtain only part of theirs whh would  
be contrary to the spirit our law whh distributes  
all the goods of a deceased debtor equally among  
creditors with any distinction of bond judgment &c

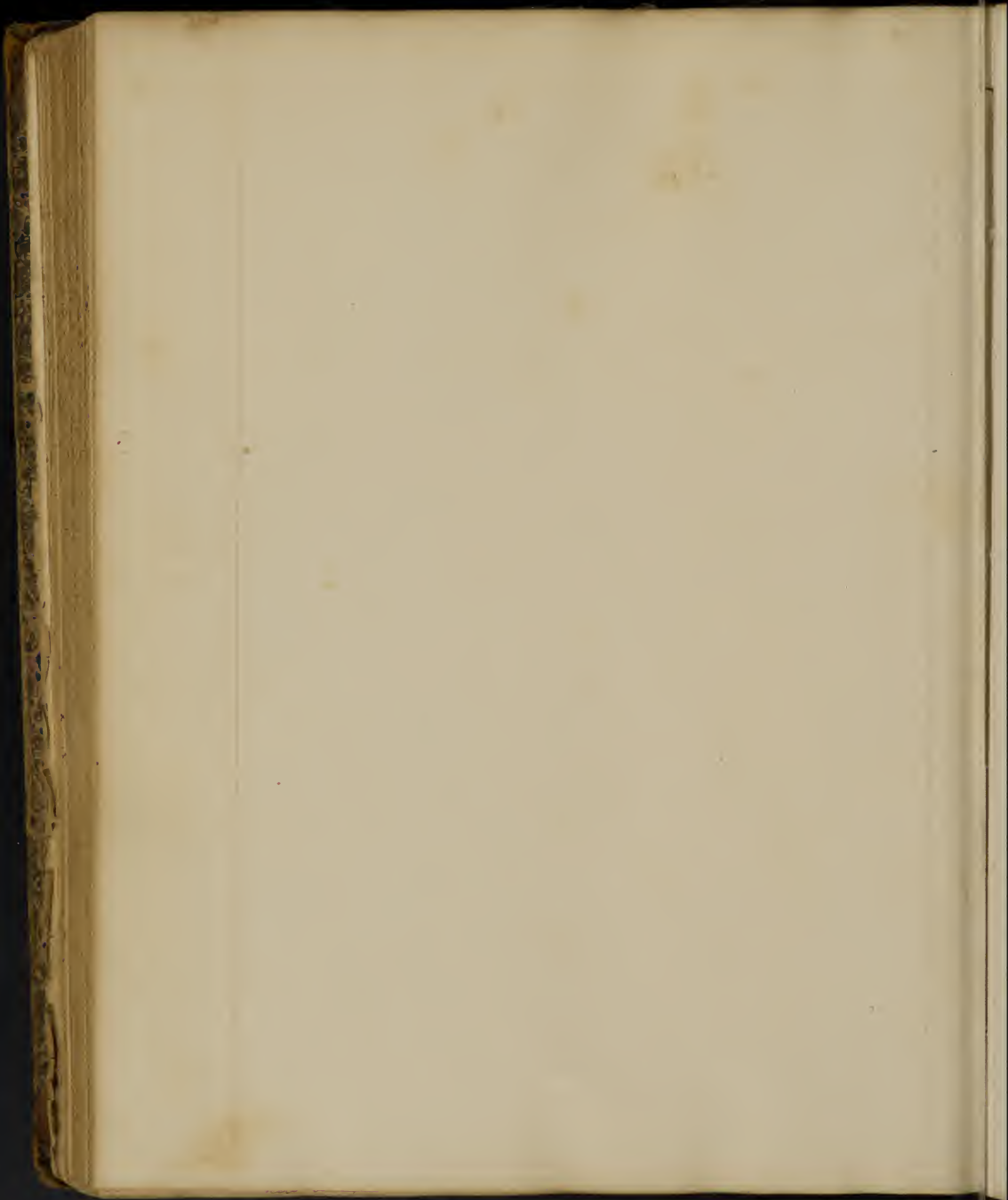
If judge is rendered ag<sup>t</sup> hus & wife &  
he dies before ex<sup>h</sup> issued ex<sup>h</sup> may be prayed Bue u<sup>br</sup>  
out by se: fa: ag<sup>t</sup> the wife alone. se fa is ex<sup>h</sup> g<sup>t</sup>  
here necessary for the same reason as in cases before stated Bro Bar<sup>sts</sup>  
viz to avoid inconsistency in the record. 526

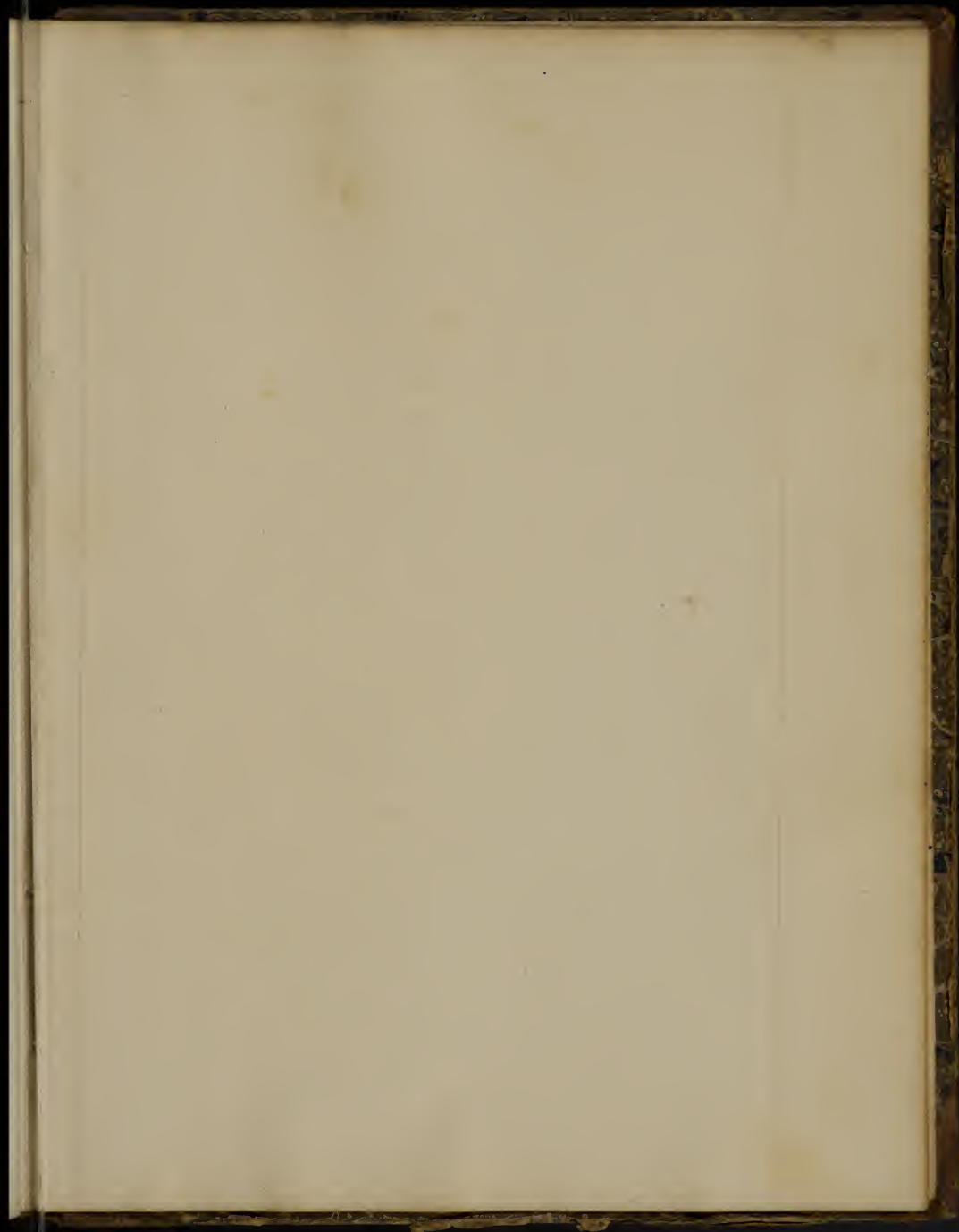
Bue u<sup>br</sup>. Bar<sup>sts</sup> fin p 3. Re 6205



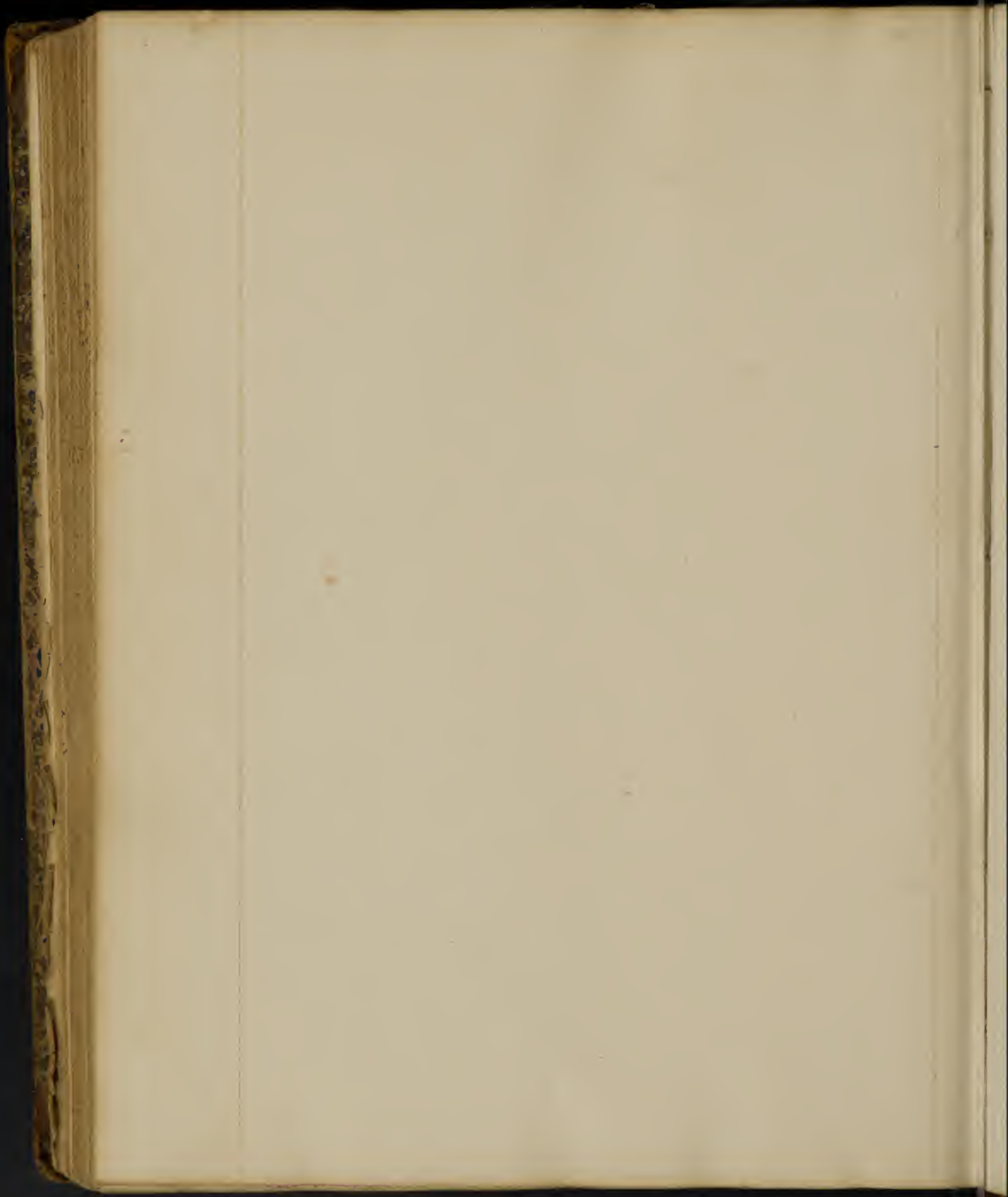


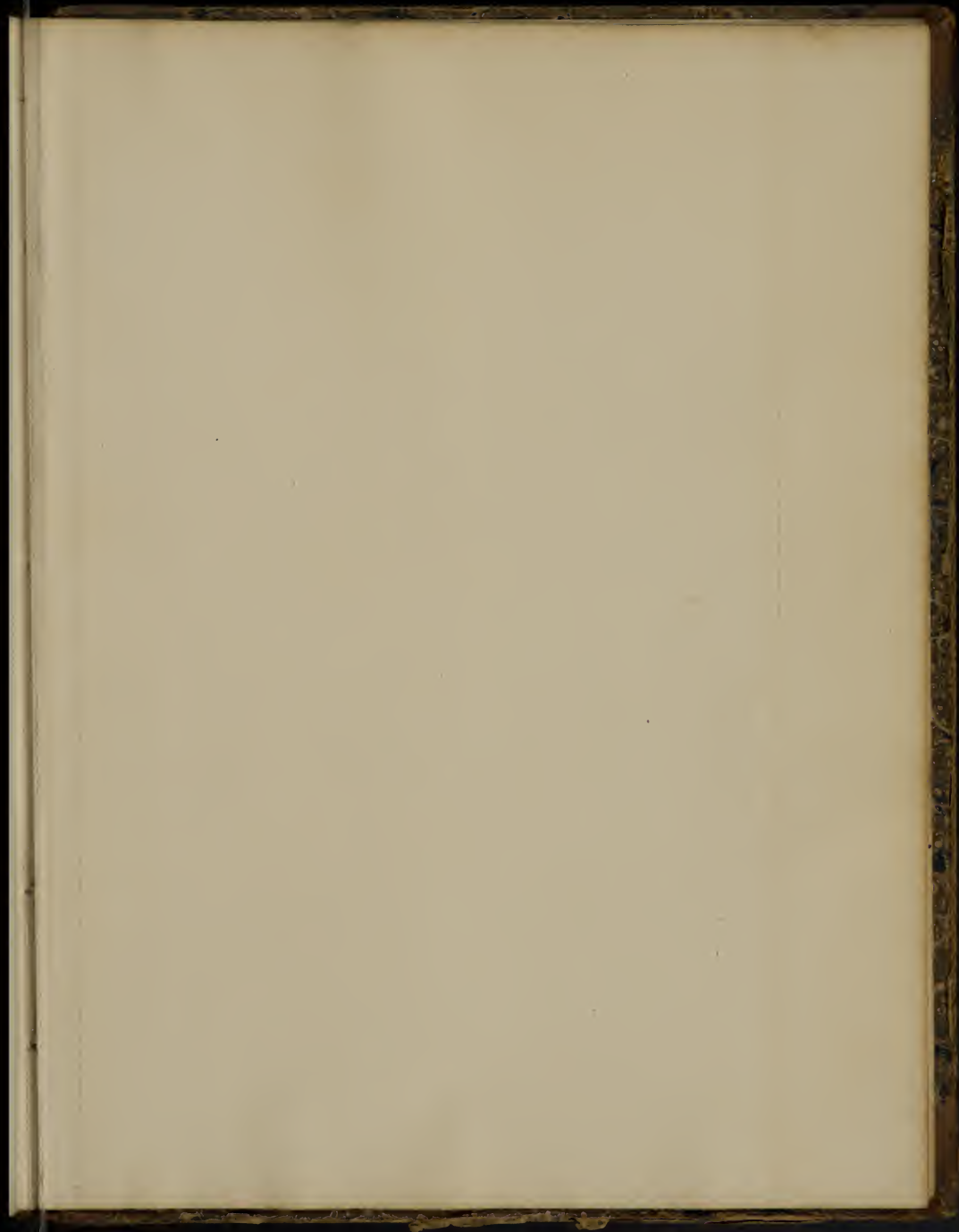


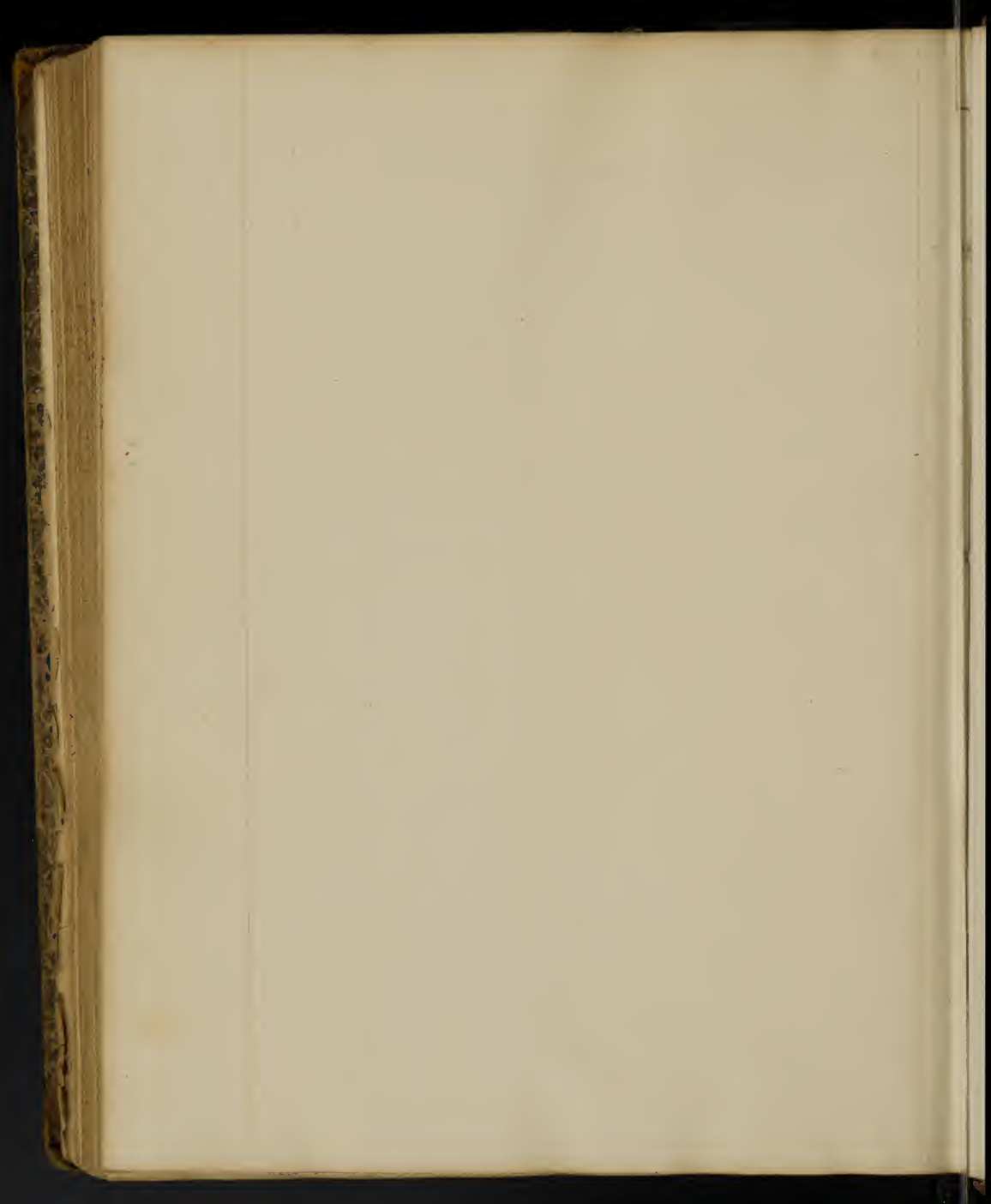




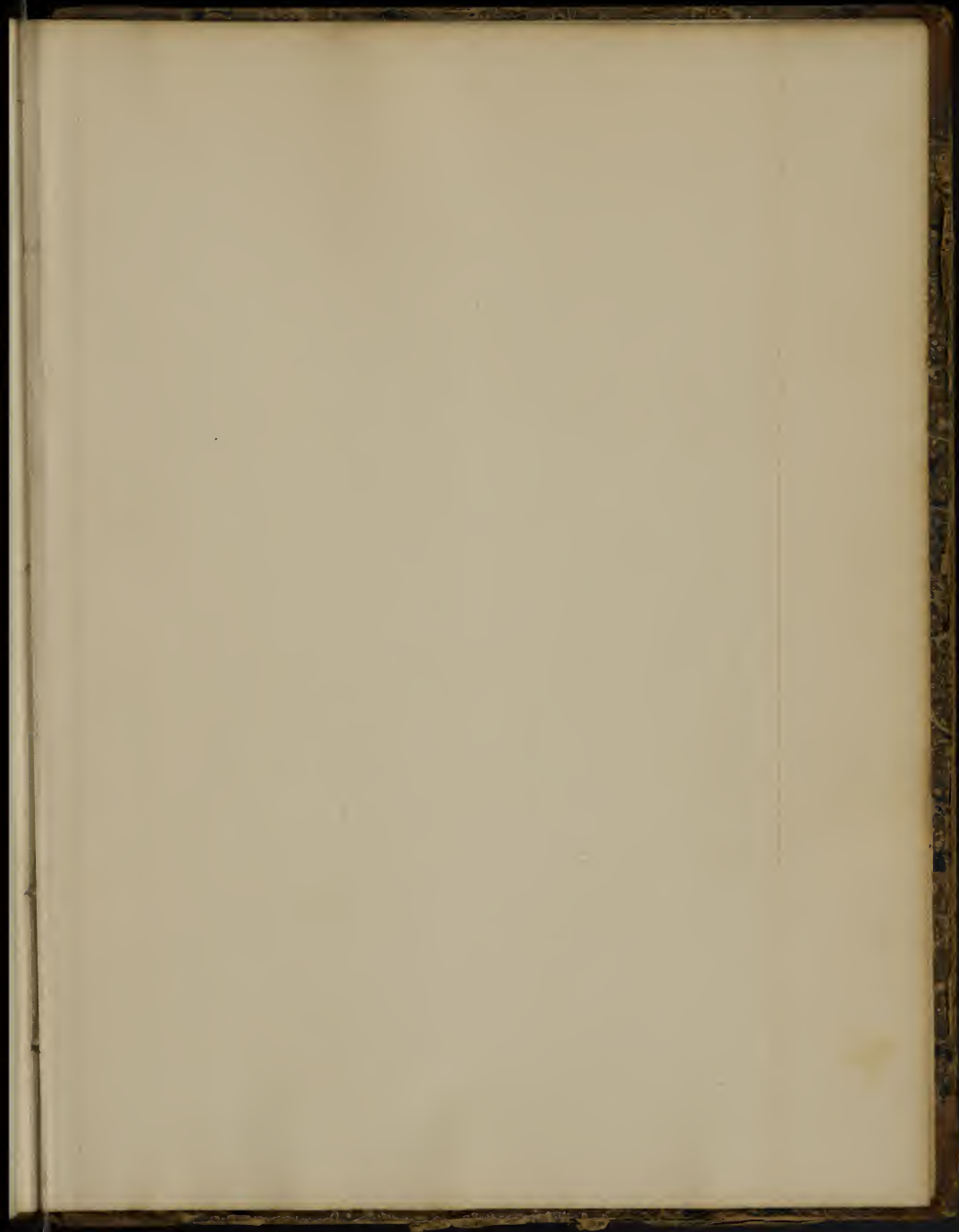


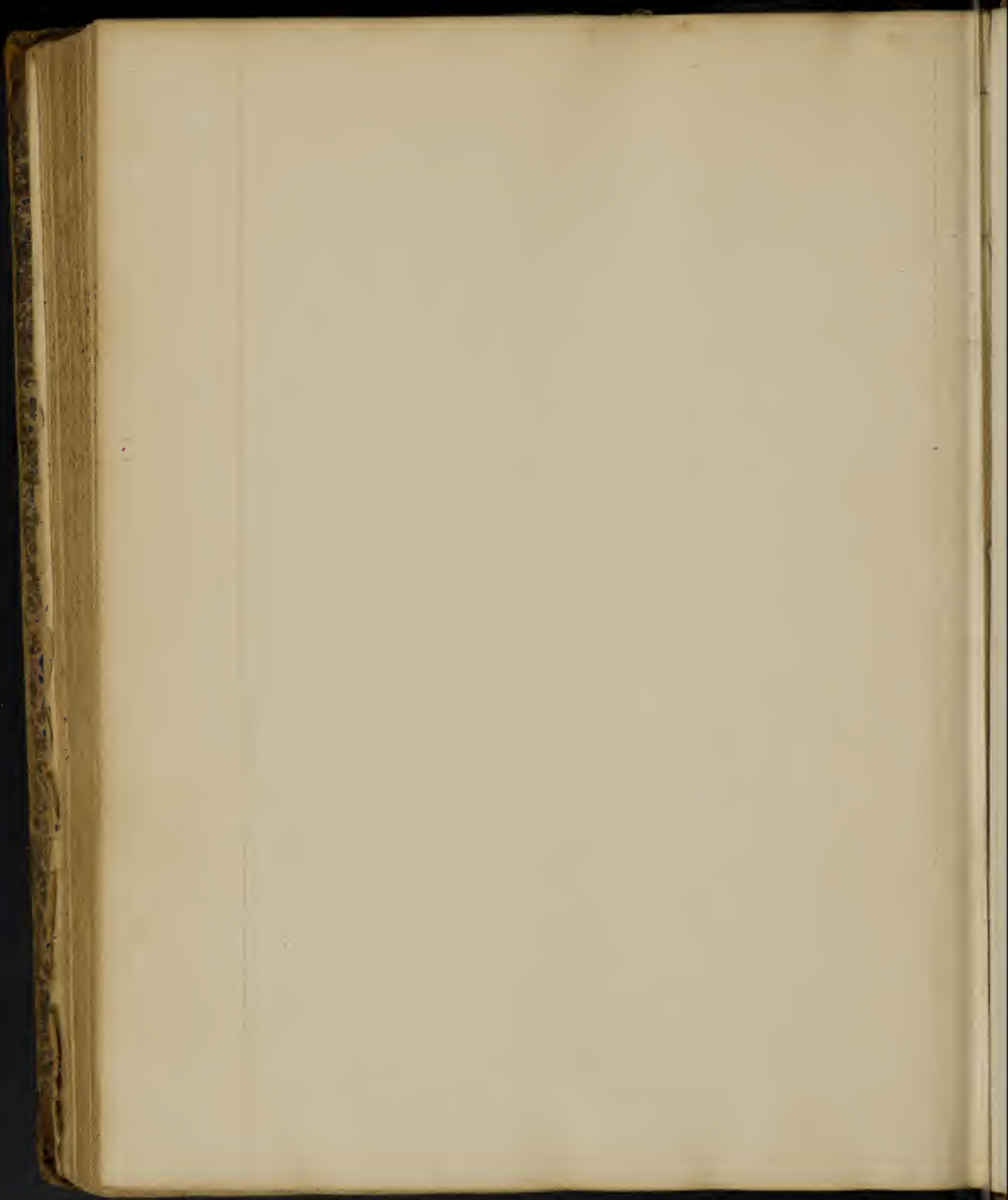


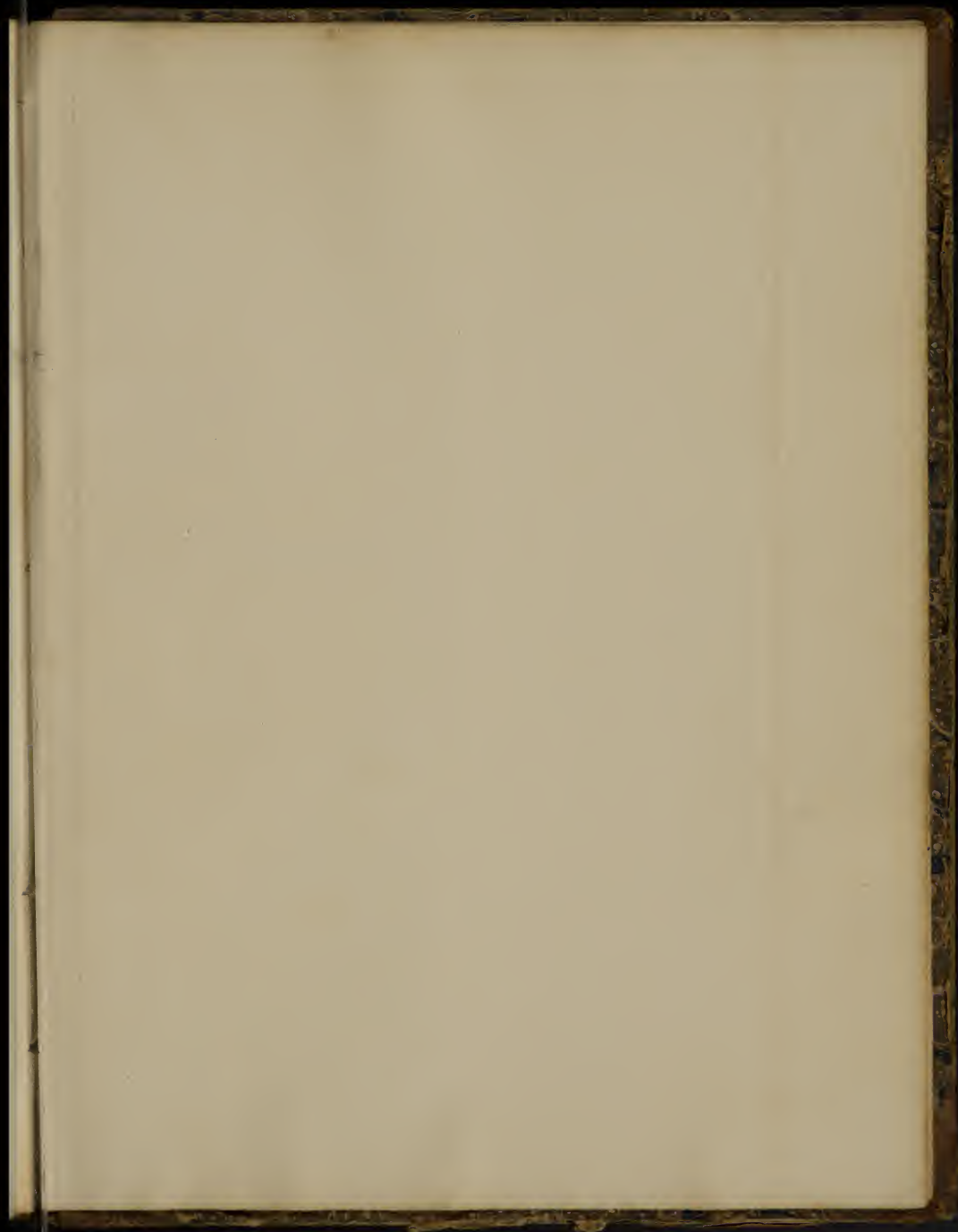




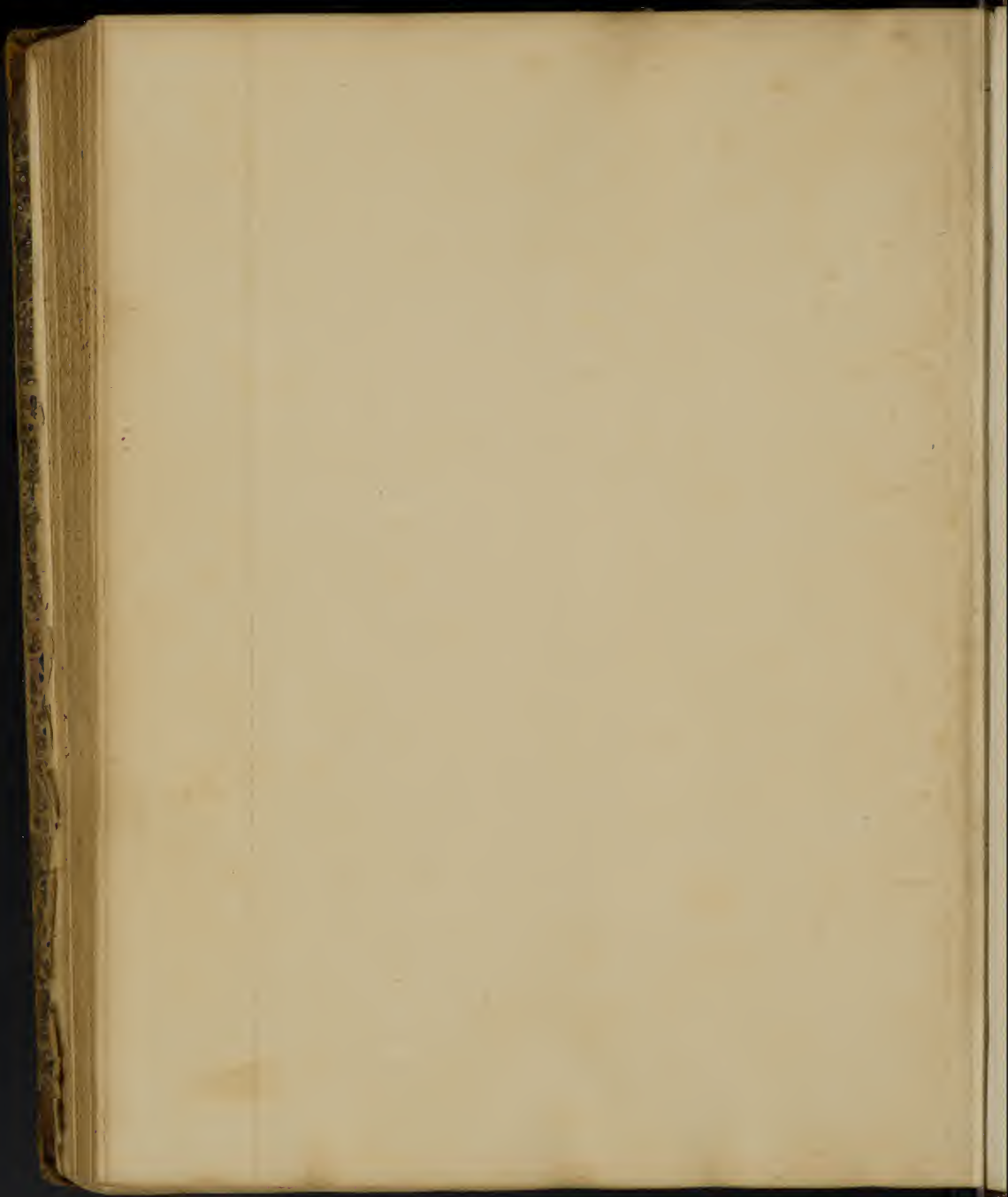


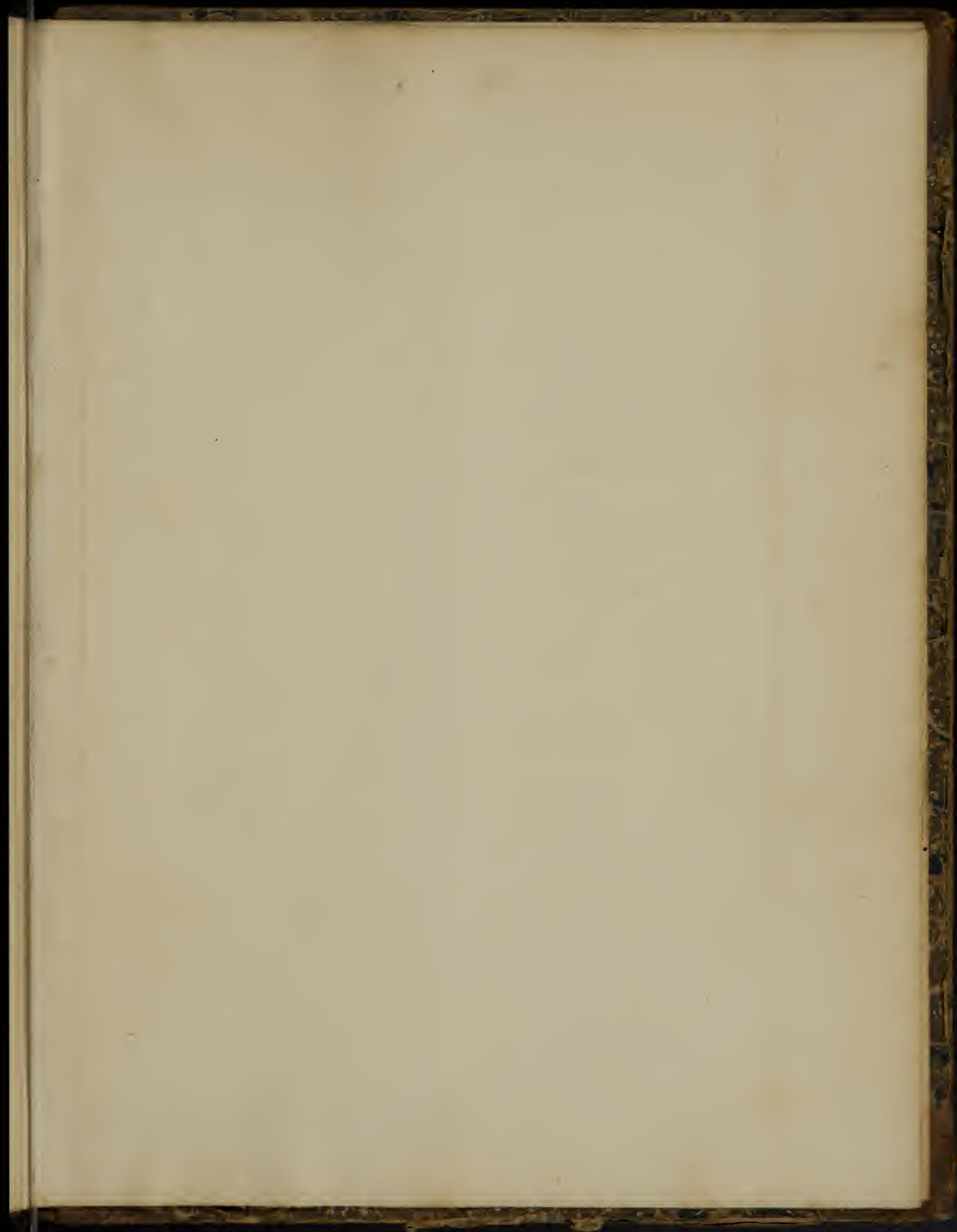


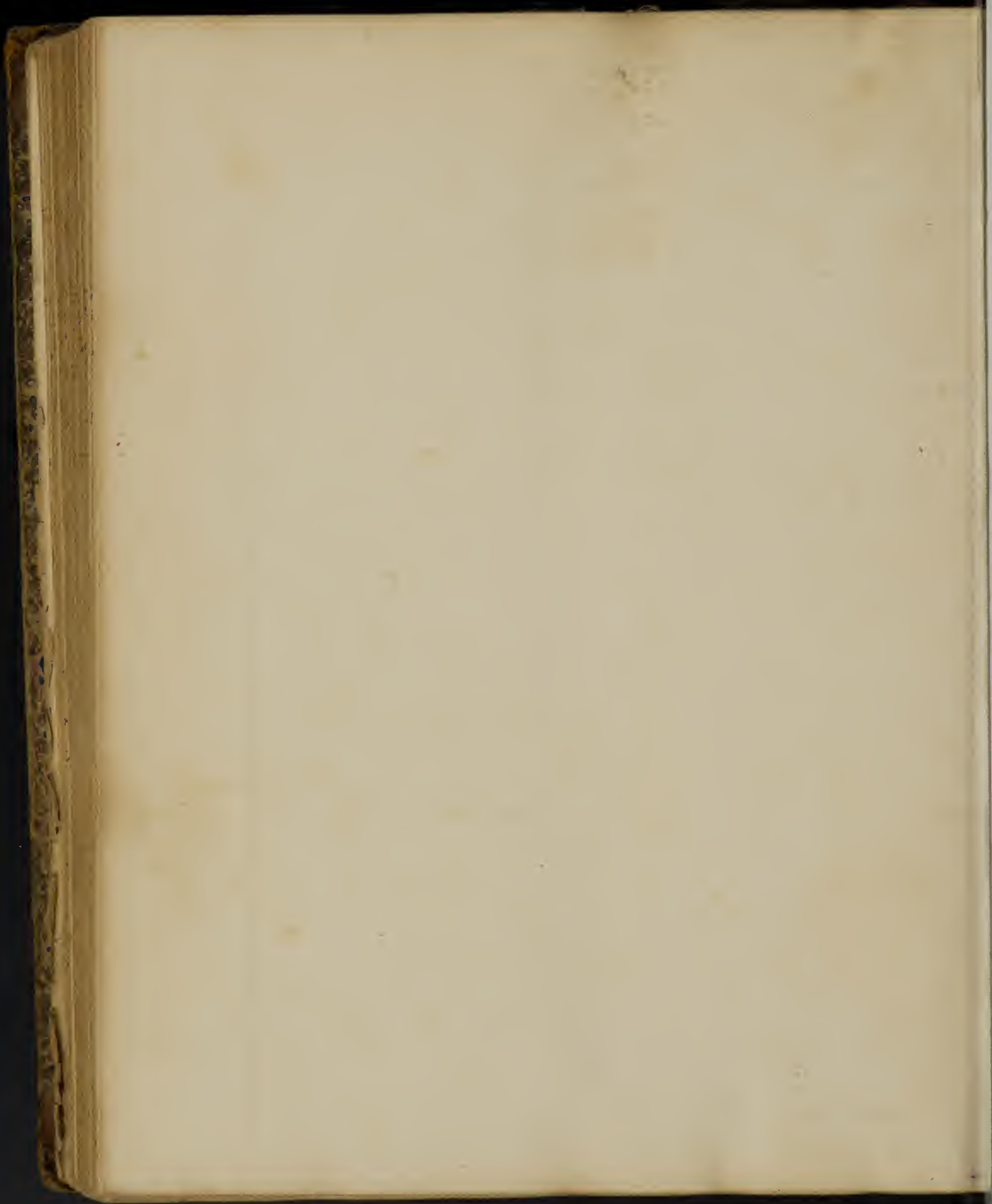












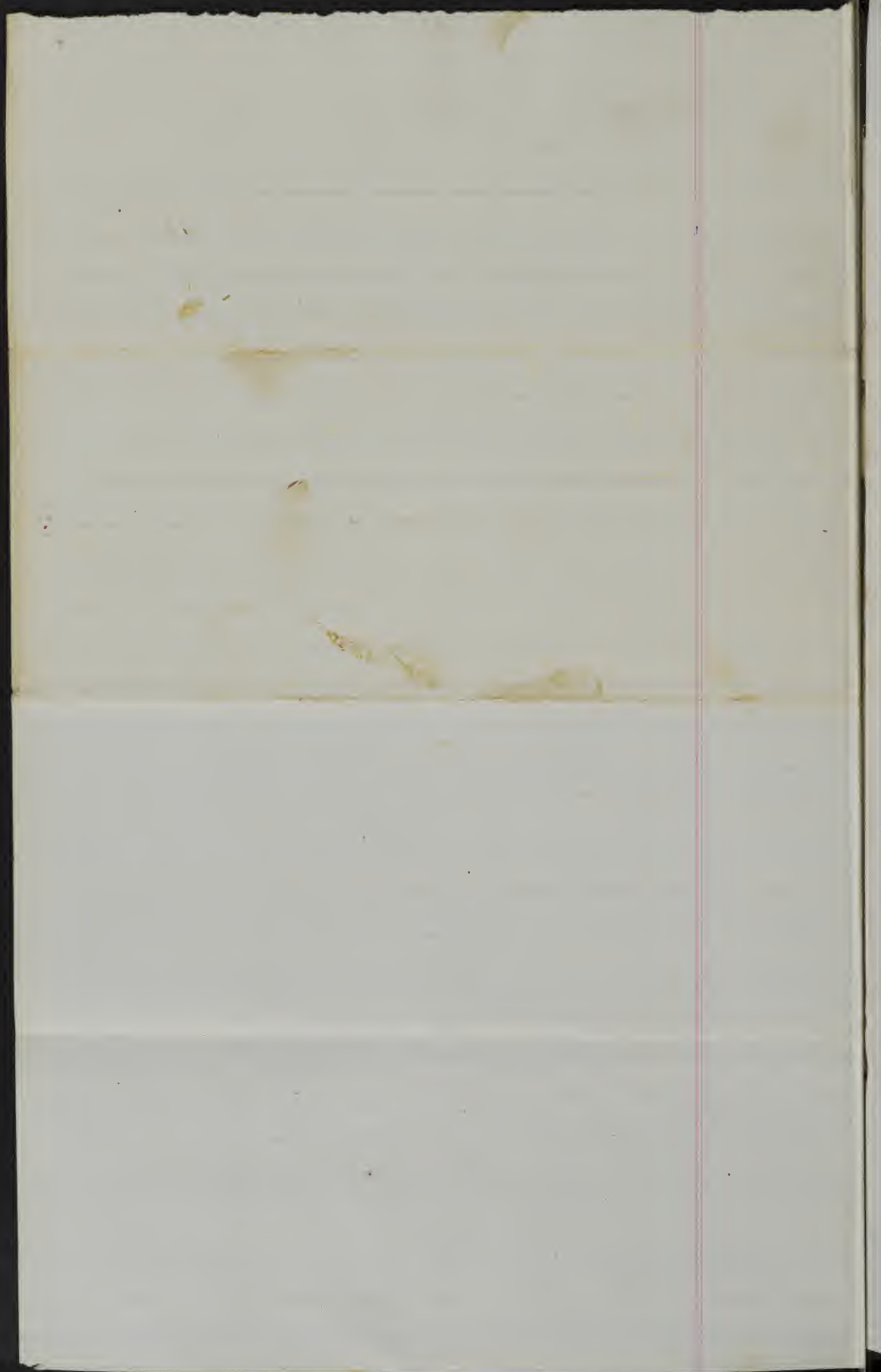


Things which are the subject of property are by the law divided into ~~things~~ real & personal and these two classes of property are subject to rules peculiar to each. This is not the place to dwell upon the marked difference which the law makes between real & personal ~~personal~~ property but we will note some of the ~~leading~~ <sup>prominent</sup> directions, and (1) Real estate descends on the death of its owner to his heirs whereas personal property passes to the owner, personal representatives, ~~Executors~~ or administrators —

2<sup>d</sup> on the death of the owner personal property is the fund primarily chargeable with the debts of the dec<sup>d</sup>.

3<sup>d</sup> personal property wherever situate is in general controlled by the laws of the owner's domicile whereas real estate is governed by the law of its siting.

(4) the transfers of real estate are made with solemnities peculiar to the conveyance of this species of property



These differences are sufficient to show the importance of carefully distinguishing between the two classes of property. In general there is but little difficulty in deciding to which class any particular subject belongs. Things real are in general such as are immovable ~~as the soil~~ things personal such as are movable hence personal chattels are frequently styled moveables - ~~the~~ land itself is the type of real property, and under the general term lands, in the comprehensive sense which the law gives to that term, all real property is embraced.

but however obvious the distinction generally is between things real & personal very puzzling questions on the subject frequently arise, a good many points on the subject too have been long settled and are familiar to jurists which when they first arose were matters of considerable doubt & deliberation. It may be well to dwell a few moments upon the inquiry what in law is regarded as part of the realty

(a) The natural produce of the soil while united with the soil is to all intents and purposes regarded as real

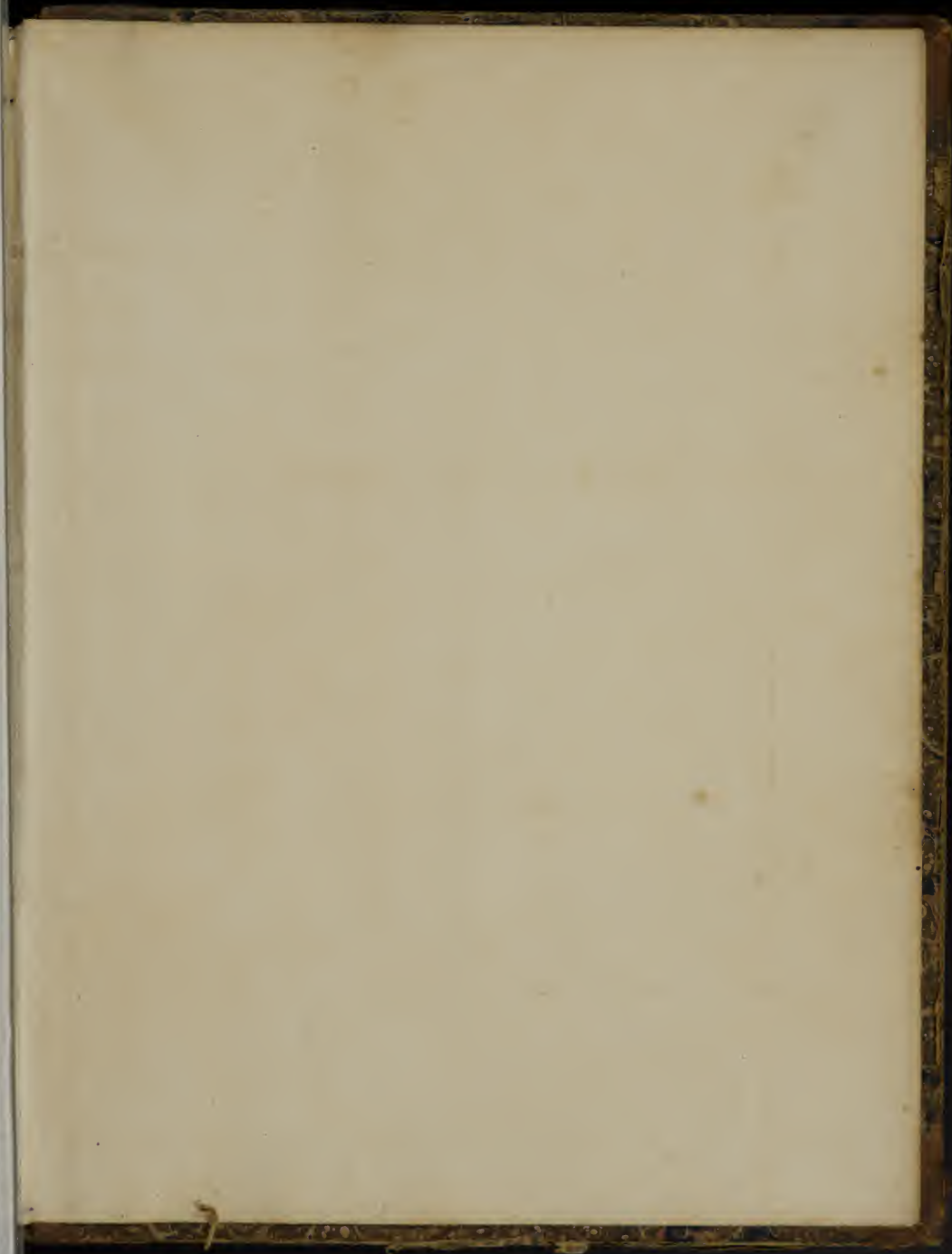


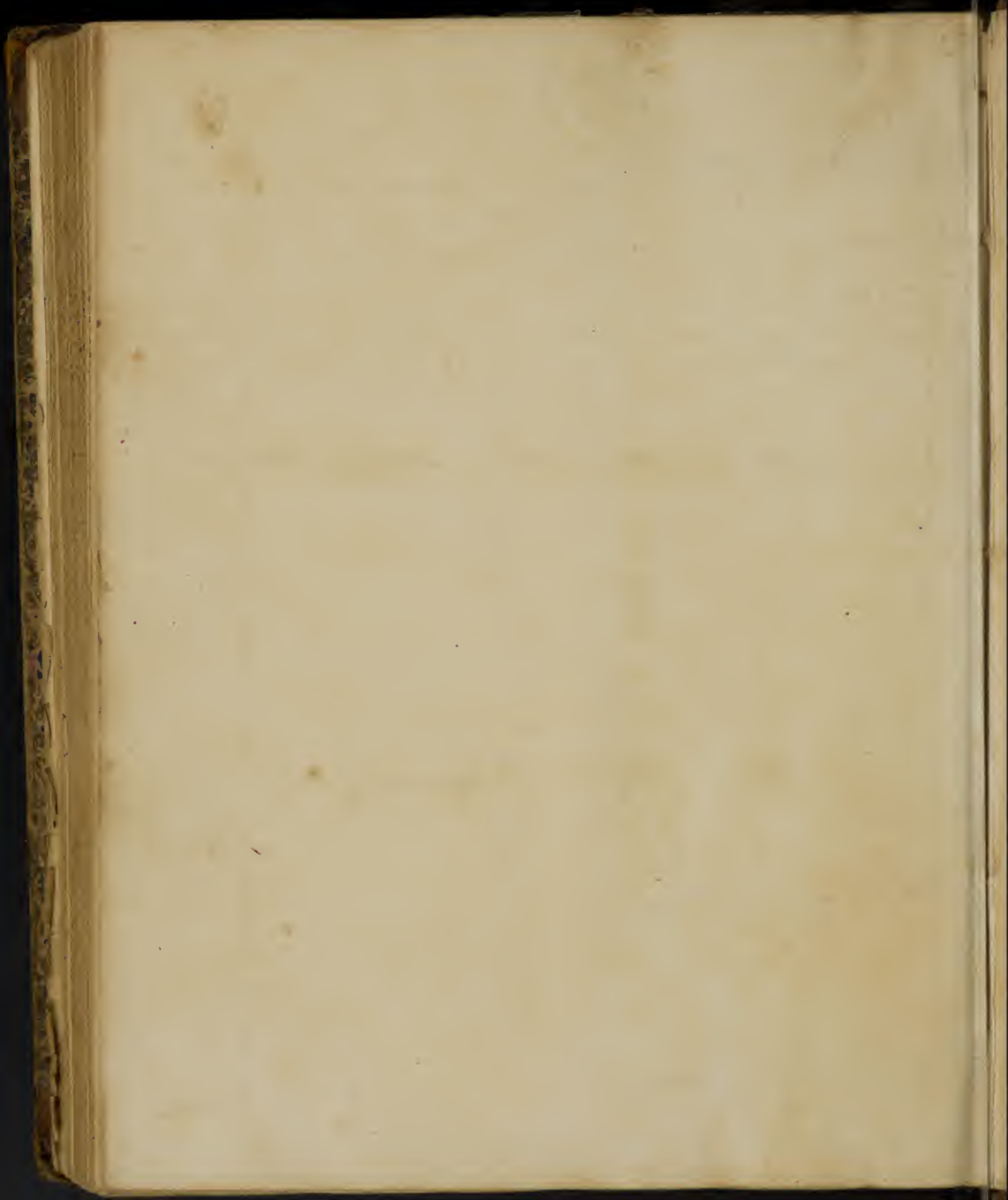
property as trees, grass, fruit, &c. so plants that  
are not the product of annual labor as  
hop vines, grape vines &c.

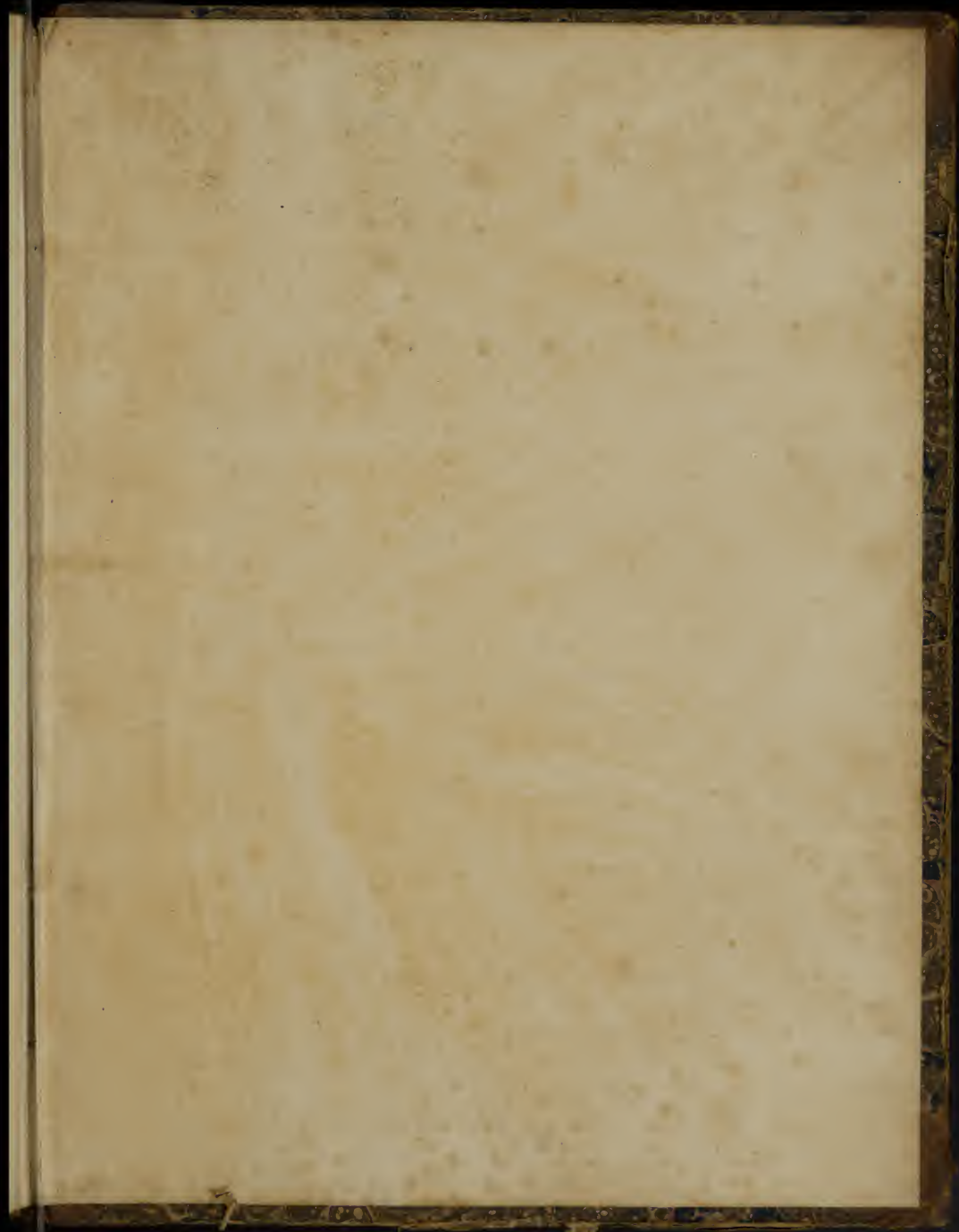
annual crops are in general also regarded  
as ~~part~~ of the realty so long as they remain  
~~ungathered~~ ~~attached~~ ~~to the land~~

ores, mines, quarries, minerals also so  
long as unmined

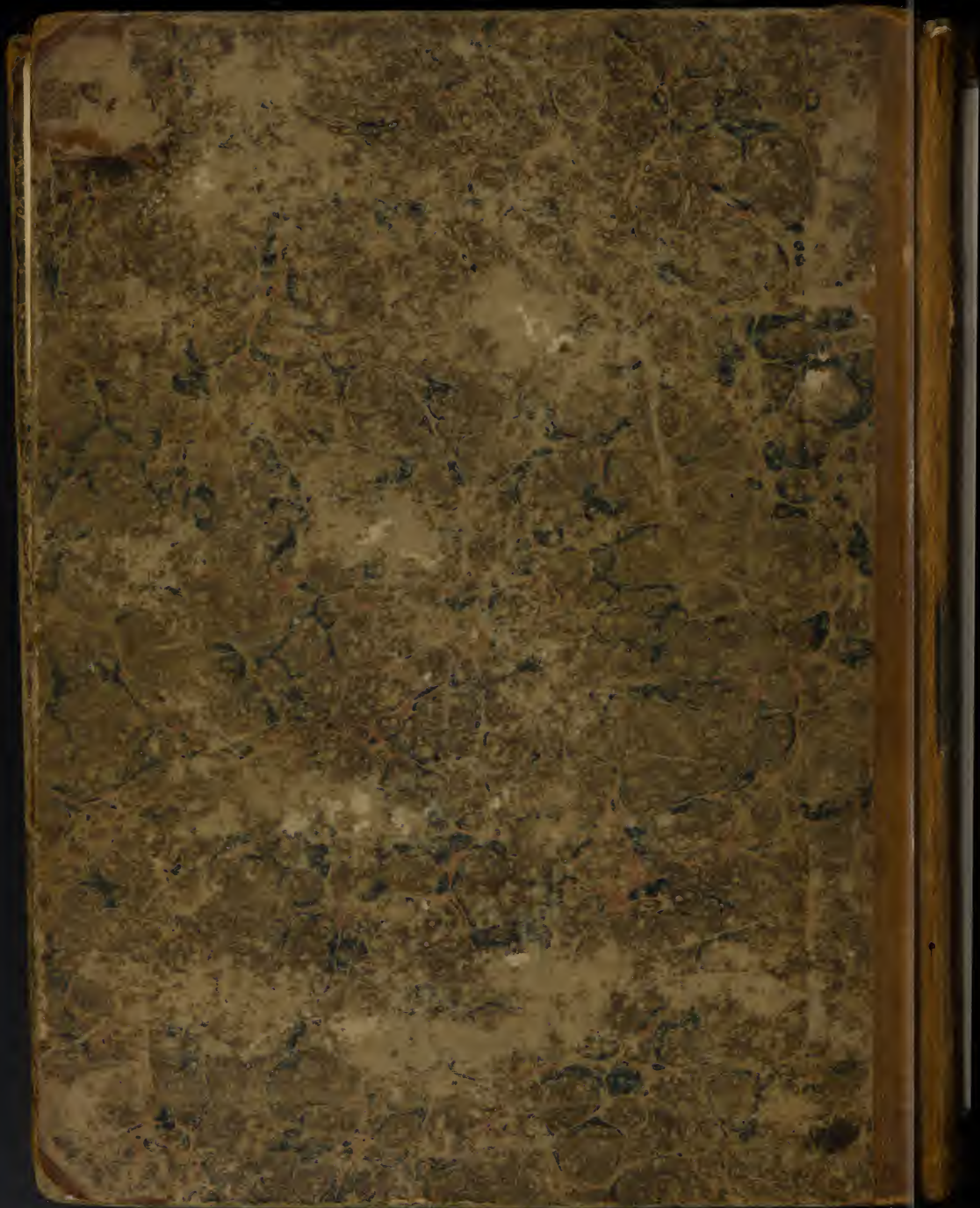
all permanent structures upon the  
land are parts & parcel of the land itself  
and regarded as real estate, as houses,  
barns, & other buildings.











GOLDEN

LECTURES

BY

III

O. S. SYMCOCK